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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
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*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SHORE MEDIA, INC. File No. BMPH-910730ID
Station WBZO(FM)
[formerly WBSI]
Bay Shore, New York

For Construction Permit for
Modification of Facilities

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; Released: June 27, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has under consideration two applications for review filed on March 8, 1993, one filed by Group W Radio, Inc.(NY) ("WNEW"), licensee of Station WNEW(FM), New York, New York, and the other by WYNY-FM, Inc. ("WYNY"), a corporate subsidiary of Westwood One Stations Group, Inc. and the licensee of Station WYNY(FM), Lake Success, New York. WNEW and WYNY request review of the action by the Chief, Audio Services Division by letter dated January 15, 1993, which denied their petitions for reconsideration of the grant of the above-captioned application for a construction permit for a minor modification in facilities, filed by Shore Media, Inc. ("WBZO"), permittee of FM Station WBZO (formerly WBSI), Bay Shore, New York. WBZO filed an Opposition on March 23, 1993. WNEW filed a Reply on April 7, 1993.[1] We deny the applications for review for the reasons set forth below.

BACKGROUND

2. In allotting Channel 276A to Bay Shore, New York, we held that the spacing rules in effect prior to those established in BC Docket No. 80-90[2] would apply to the applicants for the allotment because the rulemaking proposal was filed before the latter rules became effective. *FM Channel Assignment (Bay Shore, NY)*, 57 RR 2d 1275, 1278 n.10 (MM Bur. 1985), *review denied*, 62 RR 2d 497, 499-500 (1987). Any Bay Shore applicant would therefore be required to be spaced at least 64.4 kilometers ("km") from second-adjacent channel Class B stations WNEW and WYNY, *Letter* at n.1, rather than at the 69 km spacing required by BC Docket No. 80-90. Virtually all the Bay Shore applicants, including the predecessor to WBZO, initially proposed use of the Fire Island Lighthouse, located 66.1 km and 67.8 km from WNEW and WYNY, respectively. In 1990, the Bay Shore comparative hearing terminated in a comprehensive settlement agreement and the grant of the initial WBZO application as amended. *See supra* note 1. The amendment to that application mooted a site availability issue which had been specified in the *Hearing Designation Order ("HDO")* in that proceeding by changing the transmitter site to the WLIX(AM) tower. The amended site is spaced 65.2 km and 67.7 km from WNEW and WYNY, respectively, still well within the spacing requirements applied to applicants for the Bay Shore allotment.

3. Subsequently, in order to allay FAA concerns relating to electromagnetic interference, WBZO filed the above-captioned minor modification application, proposing the same WLIX transmitter site specified in its previously granted application but reducing effective radiated power ("ERP") from 3.0 kilowatts ("kw") to 1.7 kw. The staff granted this application on November 26, 1991. WYNY and WNEW participated in the Bay Shore licensing proceeding for the first time when they filed petitions for reconsideration of this action on December 26, 1991 and January 3, 1992, respectively. *But see* note 5 *infra*. The staff denied reconsideration, holding that the petitions for reconsideration, ostensibly lodged against the grant of the WBZO minor modification application, were in essence late filed appeals of the prior grant of the initial WBZO application. The staff further held that the minor modification application did not violate the spacing rules because it did not propose any change in WBZO's transmitter site.

4. In their applications for review, WNEW and WYNY seek reversal of the grant of the WBZO minor modification application. They assert that, because the staff did not actually issue a construction permit to WBZO for its initial application but instead waited until after grant of the modification application to issue a permit, their filing of petitions for reconsideration within thirty days of public notice of issuance of the WBZO permit must be deemed timely. That public notice, they contend, was their first notice that WBZO was now proposing the WLIX tower as a transmitter site. Because that site is closer to their facilities than the original Fire Island Lighthouse site, they contend that the amended site is short-spaced to them in violation of the Commission's spacing rules.

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[1] On April 13, 1993, "Comments in Support of Applications for Review" were filed by Long Island Music Broadcasting Corporation ("LIMBC"), whose mutually exclusive application for the Bay Shore allotment was dismissed by the Commission for failure to prosecute. *See Warren Price Communications, Inc.*, 4 FCC Rcd 1992 (1989), *recon. denied*, 5 FCC Rcd 2906 (1990), *appeal dismissed with prejudice sub nom. Long Island Music Broadcasting Corporation v. FCC*, No. 90-1302 (D.C. Cir. Mar. 26, 1991). The comparative proceeding among the applicants for the Bay Shore allotment was terminated when a settlement agreement providing for the merger of three of those applicants into a new entity, Shore Media, was approved and the application (File No. BPH-850712VE) of Shore Media was granted. LIMBC has appealed that action. *Warren Price Communications, Inc.*, 90M-3570 (ALJ Nov. 8, 1990), *aff'd*, 6 FCC Rcd 575 (Rev. Bd.), *review denied*, 6 FCC Rcd 4424 (1991), *recon. denied*, 7 FCC Rcd 4344, *further recon. dismissed*, 7 FCC Rcd 6850 (1992), *appeal dismissed mem. sub nom. Long Island Music Broadcasting Corporation v. FCC*, No. 92-1615 (D.C. Cir. Mar. 14, 1994).

[2] *See FM Broadcast Stations*, 94 FCC 2d 152 (1983), *recon. denied*, 97 FCC 2d 279 (1984).

DISCUSSION

5. At the outset, we find that WNEW and WYNY's apparent contention that the staff's grant of the instant modification application in and of itself is violative of the Commission's spacing rules is patently without merit.[3] The application does not at all affect WBZO's spacing. Rather, as noted, the application is merely one for Commission authorization to reduce power.[4]

6. In light of the above, we affirm the staff's determination that the petitions for reconsideration, although directed to the above-captioned application, were in actuality aimed at the presiding Administrative Law Judge's 1990 grant of the initial WBZO application, as amended. Public notice of grant of the initial WBZO application was afforded by the release of the ALJ's final ruling on November 8, 1990. *See* 47 C.F.R. §§ 1.4(b)(2); 1.302(a). Accordingly, the apparent contention of the applicants for review that they did not have notice of the grant of the WBZO application is incorrect as a matter of law.[5]

7. In any event, we conclude that even had WNEW and WYNY timely challenged the initial WBZO application on the grounds of alleged spacing violations, WBZO would still have prevailed. We stress that the applicants for review concede that the pre-BC Docket No. 80-90 spacing requirement (*i.e.*, 64.4 km) was properly applied to the Bay Shore allotment and to the initial applications for that allotment. Thus, they agree that the Fire Island Lighthouse site originally proposed by the predecessor to WBZO was fully spaced to them according to the applicable spacing requirements. They object, however, to the approval of the hearing amendment which proposed decreasing the spacing between WBZO and WNEW from 66.1 km to 65.2 km and the WBZO-WYNY spacing from 67.8 km to 67.7 km, contending that it was error to apply the same spacing requirements which pertained to the Bay Shore applications as they were originally filed to any subsequent amendments to those pending applications.

8. We disagree. The applicants for review have not cited any precedent where new spacing requirements were applied to a subsequent amendment to an application filed prior to the effective date of the new spacing rules. To here require that, despite our explicit determination to govern the Bay Shore applications by pre-BC Docket No. 80-90 spacing requirements, any site amendments to those applications had to be based on the stricter BC Docket No. 80-90 spacing requirements would restrict the applicants to reliance on their original site only. Nothing in the Bay Shore allotment rulemaking or the *HDO* suggests such a novel interpretation.[6]

9. Similarly, we conclude that the transitional spacing rules established in BC Docket No. 80-90 are, contrary to the position advanced by WNEW and WYNY, inapposite here. Those rules applied to *existing* stations only, *i.e.*, stations whose initial applications were previously granted. The new spacing rules adopted in BC Docket No. 80-90 did not apply to amendments to pending applications filed prior to the effective date of those revised rules. Therefore, those spacing rules did not apply to the amendment to the WBZO initial application which was approved by the ALJ.[7] [8]

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[3] In this regard, we note that Section 73.207(a) of the Commission's Rules, which addresses the applicability of the spacing tables, provides in pertinent part:

> The Commission will not accept applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements. . . . However, applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency.

47 C.F.R. § 73.207(a).

[4] In addition, we note that this application, which is ostensibly the subject of the pleadings, has been superseded by a later filed minor modification application (File No. BPH-921002IC), proposing an increase in ERP to 3.0 kw at the same WLIX tower site. Public notice of the filing of the superseding application was given on October 16, 1992 (Report No. 15372, at 5), and public notice of the grant of that application was given on January 29, 1993 (Report No. 21560, at 3). Neither WNEW nor WYNY filed an objection to that application. Subsequently, on February 12, 1993, WBZO filed a license application, notifying the Commission that it had begun broadcasting from the modified facilities pursuant to program test authority.

[5] In this regard, we also note that WNEW and WYNY (formerly WAPP) were themselves parties to the underlying Channel 276A allotment proceedings and thus aware *ab initio* of its possible implications. *See, e.g., FM Channel Assignment (Bay Shore, NY)*, 57 RR 2d at 1275-1276.

[6] Although, as the applicants for review point out, the rulemaking *Report and Order* referred to the proposal to use the Fire Island Lighthouse for a transmitter site as "unique," that characterization referred to the fact that the National Park Service approved and leased the site located on a national historic landmark. The *Report and Order* taken as a whole does not suggest we could not consider other possible sites. To the contrary, we noted therein that the actual ability of applicants to obtain final approval for that site was not guaranteed, given that one applicant had an "exclusive" lease with the National Park Service. 57 RR 2d at 1278-79. We further noted that, although the Fire Island Lighthouse site proposal might require further governmental and land use approvals, "[t]his matter is more appropriate for consideration by the Commission in connection with the application process." 57 RR 2d at 1278 n.10. Therefore, the HDO specified a site availability issue against the Fire Island Lighthouse applicants. To meet this issue, Shore Media petitioned for leave to amend to the WLIX tower site, and the ALJ, upon finding good cause, granted the petition. *See supra* note 1.

[7] As the staff noted, however, after the permit application was granted, applications to modify the WBZO permit would have to maintain or increase WBZO's spacing from WNEW and WYNY.

[8] Apparently referring to 47 C.F.R. § 73.215(a), which sets standards for contour protection for applications proposing new short-spaced facilities, WYNY points out that the 94 dBu "interfering" contour of WBZO intersects the WYNY "protected" 54 dBu contour. This section is inapplicable to WBZO's original application, which as discussed above was fully-spaced pursuant to the applicable pre-BC Docket No. 80-90 requirements, and to the instant modification application, which does not alter the location of WBZO's transmitter site. WYNY also points out that seven informal complaints of interference from WBZO have been lodged by listeners. These are being investigated in connection with the processing of the WBZO license application and are not relevant to consideration of the instant modification application. *See generally* 47 C.F.R. §73.318.

10. ACCORDINGLY, IT IS ORDERED, That the applications for review filed by Group W Radio, Inc. (NY) and WYNY-FM, Inc. ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GERALD E. DAVIS AND JO ANN DUNN D/B/A PIKETON COMMUNICATIONS — FILE No. BPH-910117ME

For a New FM Station at Piketon, Ohio.

MEMORANDUM OPINION AND ORDER

Adopted: May 12, 1994; Released: June 27, 1994

By the Commission:

1. The Commission has under consideration an Application for Review, filed on behalf of Gerald E. Davis and Jo Ann Dunn, d/b/a Piketon Communications (Piketon), seeking reinstatement, *nunc pro tunc*, of its application for a new FM station at Piketon, Ohio. The Managing Director denied Piketon's petition for reconsideration finding that its application was properly dismissed because its hearing fee was late filed.

2. Piketon's application was mutually exclusive with another application for the station at Piketon. However, prior to designation of the applications for hearing, the Commission adopted procedures that established new deadlines for tendering hearing fees.[1] According to these procedures, the Piketon applicants were required to pay their hearing fees by July 15, 1991. Piketon failed to timely submit its hearing fee, and the Mass Media Bureau dismissed its application.

3. On review, Piketon contends that our publication in the Federal Register of revisions to the timing for filing hearing fees provided inadequate notice to Piketon because, based on our existing practices, it should have received personal notification of any such revision to our rules. In support, Piketon states that the Commission's earlier procedure for submitting hearing fees required that the fee be filed by the time Notices of Appearance were due in a comparative proceeding, and that the Hearing Designation Order, triggering the time for filing Notices of Appearance, was personally served. *See* former 47 C.F.R. § 1.221(b). As a result, according to Piketon, by failing to provide personal notice, we failed to provide the full, fair and explicit notice to which it and other pending applicants were entitled. *See Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985). Therefore, Piketon urges that its application should be reinstated.

4. In addition, Piketon argues that its application's dismissal was contrary to the Commission's policy of permitting as many qualified applicants as possible to compete for authority to operate broadcast stations, citing *Ashbacker v. FCC*, 326 U.S. 327 (1945). Moreover, Piketon contends that we should have examined the equities surrounding its application to determine whether the public interest would be served by dismissal. In this connection, Piketon states that its application should be reinstated because, as the only surviving applicant for the station at Piketon, grant of its application would provide the public with additional service without any burden on Commission resources.[2]

5. We affirm the decision of the Managing Director. In accordance with the procedures established in the Administrative Procedure Act (APA), publication in the Federal Register affords sufficient notice of rule revisions, and the APA affords no special right of personal notice of rule changes to pending applicants. *See* 5 U.S.C. § 552(a)(1)(E). Moreover, our earlier rule governing the filing of hearing fees contained no suggestion that a pending applicant would receive notice other than that required by the APA. Finally, the court in *Salzer* did not suggest that applicants, pending or otherwise, were entitled to personal notice of rule changes. Rather, *Salzer* required that rules published in the Federal Register be "clear and specific." Since our notice in the Federal Register explicitly declared that pending applicants were to file their hearing fee payments by July 15, 1991, we are satisfied that Piketon received the notice that was required. *See Proposals to Reform the Commission's Hearing Fee Process*, 56 Fed. Reg. 25636 (1991). In this regard, it has been our policy since we established the fee program to dismiss applicants for failure to make timely fee payments.[3] *See Establishment of a Fee Program to*

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[1] *See Report and Order on Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991). On reconsideration, we changed the deadline for paying hearing fees in comparative broadcast proceedings. Previously, applicants were required to tender their hearing fees by the Notice of Appearance deadline. Under the new rules, applicants were required to submit their hearing fees by a date certain established in the *Public Notice* that listed mutually exclusive applications accepted for filing. To facilitate the transition to the new rules, the Commission required all applicants, accepted for filing prior to July 1, 1991, but not yet designated for hearing, to pay their hearing fees by July 15, 1991 or be dismissed. The Piketon applications were not designated for hearing prior to July 1, 1991 and were subject to the July 15, 1991 deadline.

[2] The competing application, filed by Pike Communications, Inc. (Pike), was returned because its proposal was within 320 km of the Canadian border. *See Memorandum Opinion and Order* in Docket 88-375, 56 Fed. Reg. 27424, released May 30, 1991. Pike filed a petition for reconsideration, and the petition is now pending.

[3] Once we had issued notice of the revised hearing fee requirement, Piketon was obligated to comply with the new rule. The Commission was not required to consider the factors set forth in *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), before it dismissed Piketon's application for noncompliance with a threshold requirement for designation for a comparative proceeding. Piketon's reliance on the *Comuni-Centre* case is misplaced because the applicant in that proceeding had fully complied with our predesignation requirements and was a party to a comparative proceeding when its application was dismissed. *Comuni-Centre* does not govern a case, such as this, where the Commission is concerned with threshold requirements that must be met before an applicant is even entitled to be designated for hearing. This situation is instead

Implement the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 957 (1987), *recon denied*, 3 FCC Rcd 5987 (1988). In this proceeding, we explicitly informed all pending applicants that "*failure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying application.*" *See Proposals to Reform the Commission's Hearing Fee Process*, 6 FCC Rcd 3403, 3408 (1991). Thus, our public notice of the revised hearing fee requirements was clearly adequate under the APA.

6. Finally, the Bureau's dismissal of Piketon's application was not inconsistent with our policies. We are authorized to make any rules necessary to promote the efficient conduct of our business and to bar those who fail to meet these standards, including those who fail to comply with the fee payment requirements. *See* 47 U.S.C. §§ 158(b)(2), (f); *see also United States v. Storer Broadcasting Co.*, 351 U.S 192, 202-03 (1956). Piketon's failure to comply with our rule concerning the timely filing of its hearing fee rendered its application unqualified for further consideration. *See* 2 FCC Rcd at 957-58 (1987). We are satisfied that the overall public interest in efficient administration of fee and application processing, which is furthered by strict adherence to our fee payment rules, outweighs any detriment resulting from the dismissal of Piketon's application.

7. Accordingly, IT IS ORDERED, That the Application for Review filed by Gerald E. Davis and Jo Ann Dunn, d/b/a Piketon Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

governed by *Salzer* and its progeny and, for reasons previously discussed, the test for a predesignation dismissal has been satisfied here.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Michael Steven Levinson

against

New Hampshire Noncommercial
Television Stations WENH-TV, Durham,
and WEKW-TV, Keene, and
Massachusetts Noncommercial
Television Station WGBH-TV, Boston

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 27, 1994

By the Commission: Commissioners Ness and Chong not participating

1. The Commission has before it an Application for review,[1] filed March 16, 1992, by Michael Steven Levinson ("Levinson"), seeking review of a February 12, 1992, Mass Media Bureau ruling, released February 19, 1992 (7 FCC Rcd 1457 (1992)). The Bureau's ruling denied Levinson's reasonable access complaint against the above-captioned noncommercial television stations ("Stations"), filed under Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312(a)(7)).[2] Levinson asserted his right to reasonable access as a candidate for the Republican nomination in the 1992 New Hampshire presidential primary. WENH-TV filed an opposition to the Application on March 30, 1992. After careful review of this matter, we conclude that the Application does not contain sufficient grounds to warrant a reversal or alteration of the Bureau's ruling and must be denied.

BACKGROUND

2. In his original complaint,[3] Levinson asserted that he was denied reasonable access by Stations in his bid for the Republican presidential nomination on the New Hampshire primary ballot.[4] Levinson complained that Stations had unreasonably denied his request for a three-hour block of programming in prime time, offering instead five minutes in prime time.[5] The stations provided two principal reasons for denial of his original request: (1) three hours of prime time would unduly disrupt normal program scheduling; and (2) the number of other presidential candidates on the New Hampshire primary ballot (36 Democratic and 18 Republican) at the time of Levinson's request. The Bureau ruled that it was not unreasonable for Stations to conclude that both the length of time requested and the

[1] The Application is 40 pages in length, with an additional 18 pages of attachments. This length is in excess of the 25-page limit imposed by Section 1.115(f)(1) of the Commission's rules. Despite Levinson's failure to request leave to exceed the limit, we will consider the merits of his entire Application at this time.

[2] Section 312(a)(7) states:

> (a) The Commission may revoke any station license or construction permit --
>
> * * * *
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Levinson has campaigned for various federal offices in elections since at least 1980, including the presidency, using different independent and major party affiliations. *See e.g. Michael Steven Levinson,* 87 FCC 2d 433 (1980). In connection with these election bids, Levinson has regularly contacted the Commission for advice and to file Section 312(a)(7) and Section 315(a)(equal opportunities) complaints. The majority of his complaints have been resolved informally by telephone, a procedure discussed more fully below.

[3] Levinson's initial complaint was filed December 18, 1991. Subsequently, and prior to the Bureau's ruling, Levinson either faxed or mailed to the Bureau an additional 11 filings. These filings total 199 pages. In addition to his written filings, Levinson frequently telephoned Bureau staff to seek informal intervention on his behalf and to further supplement his complaint.

[4] Reasonable access obligations are incurred by stations within their normal service area. *The Law of Political Broadcasting and Cablecasting,* 100 FCC 2d 1476, 1486 (1984); *Letter to Peter Mobilia, Jr.,* (B/c Bur. June 17, 1977). Generally, a television station's grade B contour will establish the service area for this purpose. WGBH-TV places a grade B contour over the southern part of New Hampshire and thus must accommodate reasonable access requests from candidates qualified for the New Hampshire presidential primaries. Levinson's claim of qualification for the New Hampshire ballot was unchallenged by Stations. In addition, he provided the Commission with a copy of New Hampshire's certification of his status as a legally qualified candidate.

[5] Levinson requested access from 7:30 -10:30 p.m., on January 13, 1992. In explaining to Stations his need for a three-hour campaign address, Levinson stated:

> The reasons I require this block of time are multi- In the first place, I am the author of a giant work of art, **The Book of Lev (c) 1971**, that I self- characterize, "a spoken poem for all man kind, written down." It is a magnum opus that takes into account all the world's major stories, beginning with Adman and Even in the Gar Den ov Edum and from there, covering the course of human history on the good ship mother earth ... I will be able to utilize my talent and create the very first peaceful night in more than 5000 years of recorded history by keeping all the world's peoples occupied in front of their TV sets as participants in the first multi-lingual world vid poem.

Levinson indicated that he would utilize the five-minute offer, but ultimately failed to do so. Thereafter, he apparently made at least two more requests for substantial blocks of prime. time from Stations, to which Stations again offered five minutes.

possibility of a significant number of requests from the other candidates supported the validity of the five-minute, prime-time counter-offers.[6]

3. In his Application for Review, Levinson argues that the program disruption factor discussed in *Carter Mondale* concerned last-minute requests and thus is inapplicable to his request, which was made several months before the election. He also argues that Stations had no reasonable basis for anticipating a significant number of equal opportunities or reasonable access requests since no other candidates had shown any interest in using the Stations' facilities at the time of his request. The Application also contends that the Bureau failed to address two other Section 312(a)(7) matters raised by Levinson in the course of his series of filings, a reasonable access request in connection with his Massachusetts primary election candidacy and his requests of the NBC and PBS television networks in connection with his New Hampshire primary election candidacy.[7] Discussion of these issues follows our analysis of the Bureau's ruling.

DISCUSSION

4. Section 312(a)(7) of the Act requires broadcasters to allow reasonable access to or permit the purchase of reasonable amounts of time by legally qualified candidates for federal elective office. The Supreme Court's *Carter/Mondale* decision approved the Commission's policy identifying permissible factors which licensees may take into consideration in evaluating federal candidates' Section 312(a)(7) requests. As the Bureau stated in its ruling, two of the factors specified by the Commission and noted by the Court, the multiplicity of other federal candidates and the potential for substantial program disruption, directly support Stations' denial of Levinson's request for three hours of prime time and their five-minute, prime time counter-offers.[8] One additional factor to be considered when responding to an access request, as set forth by the Commission and discussed favorably by the *Carter/Mondale* Court, is the amount of time previously sold or given the candidate. This factor, however, was not pertinent to Station's counter-offer since it was Levinson's first request for time. It should be noted that all of the factors upon which a broadcaster may rely to justify a reasonable access counter-offer do not have to be present. A broadcaster may reasonably counter-offer an access request based on any of the factors individually.

5. Furthermore, the fact that other candidates may not have approached Stations at the time of Levinson's request is not controlling. The *Carter/Mondale* Court emphasized that the Commission does not mandate "blind assent" to candidate requests and that a "reasonable probability" for equal opportunities requests from competing candidates is a legitimate issue for stations to consider in terms of the multiplicity of candidates.[9] We believe Stations reasonably determined that a reasonable probability existed that many such requests would follow any Levinson appearance.[10] As the Bureau also properly reasoned, Stations are noncommercial and must provide both reasonable access and equal opportunities on a free basis, thereby significantly increasing the potential for further candidate requests.[11] Finally, although program disruption is more significant when the request is made in close proximity to an election, the program disruption factor is nonetheless pertinent throughout the entire campaign period. Stations were not unreasonable in concluding that the request for a three-hour block of time on a specific date would unduly disrupt their programming, particularly given the likelihood of equal opportunities requests for equivalent blocks in prime time. In sum, as the Bureau correctly found, Stations applied appropriate factors in assessing Levinson's requests. There is nothing in the record to suggest that Stations acted unreasonably or in bad faith in their negotiations with him. Thus, the Bureau's ruling must stand.

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[6] In *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) ("Carter/Mondale"), the Court affirmed the Commission's policy of permitting broadcasters to consider substantial program disruption and the multiplicity of other candidates in weighing Section 312(a)(7) requests. The Court also noted that, under the Commission's policy:

> If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance.

Id. at 387.

[7] The Application also raises several unpersuasive constitutional claims to Levinson's right to air his views. With respect to his contention that the First Amendment guarantees a right to broadcast his views, the U.S. Supreme Court has ruled that no individual has such a right. *CBS v. DNC*, 412 U.S. 94 (1973). His Fifth Amendment claim does not indicate what rights have been violated under that Amendment. Finally, we see no basis for his Seventeenth Amendment claim in this context, since that Amendment merely established popular election of the U.S. Senate.

[8] The Court stated that:

> In responding to access requests, however, broadcasters may give weight to such factors as the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a).

453 U.S. at 387.

[9] *Id.* at 389. Furthermore, the Court also held that Section 312(a)(7) mandated an affirmative right to reasonable access for all federal candidates. *Id.* at 368. Thus, in addition to the potential for equal opportunities requests from Levinson's 18 Republican opponents, Stations could reasonably consider the potential for reasonable access requests from the 35 Democratic candidates, albeit not necessarily in the same amount made available to a Republican candidate during a primary election period.

[10] Under Section 73.1941(c) of the Commission's rules (47 C.F.R Section 73.1941(c)), competing candidates have seven days from the time of an opponent's appearance to make an equal opportunities request.

[11] Although a noncommerial station may charge reasonable production fees for use of its facilities by a federal candidate, the absence of any allowable charge for the time itself distinguishes this case from the Commission's view in *Carter/Mondale* that further requests were "speculative." *Carter/Mondale* involved only the commercial television networks, each of which had asserted that no additional or contingent requests for time were pending, and it appeared unlikely that a large number of candidates would seek time from each of the networks. 74 FCC 2d at 674. Clearly, the substantial cost of purchasing major television network time in *Carter/Mondale* contrasts with the circumstances in the case before us.

6. In addition to seeking review of the Bureau's ruling, the Application also contends that the Bureau failed to address in its ruling other matters raised by Levinson. However, neither of these matters was the subject of a pending complaint at the time the Bureau released its ruling. In addition, as discussed below, the Bureau handled issues raised by Levinson informally by telephone at his express suggestion.[12]

7. In the first matter involving the Massachusetts primary, Levinson argues that the Bureau overlooked his reasonable access complaint against WGBH-TV in connection with his candidacy in the March 10, 1992, Massachusetts presidential primary for the Independent Voters Party.[13] In a letter dated January 8, 1992, WGBH-TV Corporate Counsel Eric Brass offered Levinson five minutes in prime time on any weekday in response to a three-hour prime time reasonable access request apparently made by telephone. The record does not show whether Levinson accepted WGBH-TV's offer. In a letter to WGBH-TV dated February 14, 1992, Levinson again requested a three-hour block in prime time on the station in connection with his Massachusetts candidacy to air on one of several dates. In a February 17, 1992, response from Eric Brass, WGBH-TV again denied Levinson's three-hour request, and counter-offered with five minutes of prime time on any weekday. As a basis for his denial, Brass cited the other 18 candidates on the Massachusetts primary ballot and the length of time requested. Levinson included copies of these letters in his February 25, 1992, complaint to the Bureau about WGBH-TV's denial. The Bureau obviously could not have responded to this complaint involving the Massachusetts primary because the complaint was not filed until six days after the Bureau released its ruling on February 19, 1992. The Bureau handled the February 25 complaint informally by telephone with Levinson and WGBH-TV prior to the March 10 primary. For the same reasons articulated in the Bureau's February 19, 1992, ruling (program disruption and the multiplicity of other candidates), the Bureau advised the parties that WGBH-TV's denial of Levinson's request and the five-minute counter-offer appeared to be reasonable.

8. The second matter Levinson raises in his Application is his contention that the Bureau never ruled on his Section 312(a)(7) complaints against the NBC and PBS networks relative to the New Hampshire primary. In his fourth filing dated December 27, 1992, Levinson indicated that he had requested that both the NBC and PBS television networks provide him with a three-hour block of time, 7:30 -10:30 p.m. on January 13, 1992, but that they had failed to respond. With respect to NBC, Levinson also requested that since the network planned to air a debate between several Democratic candidates on the New Hampshire ballot, it should provide him access without charge. The Bureau contacted the networks by telephone after receipt of Levinson's December 27 letter and asked them to respond to his requests.

9. NBC denied his request in a letter dated January 6, 1992. NBC stated that Levinson had claimed to be legally qualified only in New Hampshire and that because NBC was not the licensee of a station in New Hampshire, no obligation as to the network existed. NBC also stated that under Commission rules a candidate cannot claim to be legally qualified on a national basis until he/she is qualified as a candidate in at least 10 states.[14] Responding to Levinson's request that the access be provided without charge, NBC noted that it was not obliged to do so because the reasonable access provision permits commercial broadcasters to meet the obligation by either giving or selling the time. NBC also noted that the debate between Democratic challengers was an exempt news event and, since it involved candidates from a party different from Levinson's, he would have no rights thereto even if it were not exempt.

10. PBS also denied Levinson's request by letter dated January 6, 1992. PBS noted that Levinson had claimed ballot status in New Hampshire alone and was entitled to reasonable access only at PBS affiliates serving that state, negotiations that would have to be carried out at each station in the state. However, although it could not guarantee carriage by any of its affiliates, PBS did agree to make transmission time available to Levinson on the public satellite interconnection system, subject to the normal conditions and production charges.

11. Although Levinson did not file a complaint after receiving NBC's or PBS' January 6, 1992, denials, he was advised by the Bureau during telephone discussions prior to the New Hampshire primary that, as delineated by each network, the Commission's ten-state rule precluded any reasonable access or equal opportunities obligations for the networks until such time as he had qualified on the ballot of at least ten states, or nine states and the District of Columbia. Thus, in accordance with the clear meaning of the Commission's rules, at the time he made his requests of the networks, Levinson was entitled to reasonable access only on those stations which serve New Hampshire. Neither of the networks is the licensee of a New Hampshire station, nor of any station whose normal service area includes New Hampshire. NBC correctly pointed out to Levinson that the reasonable access provision requires commercial broadcasters to give *or* sell time to meet its obligations. Therefore, even had Levinson established a

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[12] In both Levinson's initial complaint filing of December 18, 1991, and in his facsimile filing of December 27, 1991, he invites the Bureau to "use the telephone in the conduce [sic] of adjudicating this complaint." Levinson's filings reference telephone conversations he had with the staff concerning resolution of his complaint. Because of the large number of complaints and inquiries received by the Bureau, particularly in the period before a presidential election and the short amount of time to deal with such complaints, the Bureau staff regularly attempts to answer questions and informally resolve disputes between parties by telephone prior to the election, without issuing written rulings.

[13] According to Levinson, he qualified on December 31, 1991, for the Massachusetts primary ballot as a candidate for nomination by the "Independent Voters Party."

[14] Section 73.1940(e)(2) of the Commission's rules (47 C.F.R. Section 73.1940(e)(2)) states in part with regard to attaining national legally qualified status under the rules:

> [E]xcept, that any such person meeting the requirements set forth in paragraphs (a)(1) and (2) of this section in at least 10 States (or 9 and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this Act.

right under Section 312(a)(7) in regard to NBC, his refusal to purchase the time would preclude any obligation on NBC's part.

12. Based on the above, we believe that the Bureau's ruling was correct. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 27, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL FOR VIDEO DIALTONE GATEWAY SERVICE AND WAIVER OF TRIAL PERIOD

(CC DOCKET NO. 88-616)

On June 14, 1994, US West Communications, Inc. (US West), filed a notification of a market trial for a "level 2" video dialtone gateway service. US West states that the trial will be conducted in conjunction with the basic video dialtone market trial in Omaha, Nebraska, that was authorized by the Commission in December 1993. *See Section 214 Order*, 9 FCC Rcd 184 (1993). US West states that its enhanced video dialtone gateway will support analog and digital video services delivered to the enhanced gateway by video programmers and delivered to customers via the US West basic video dialtone gateway. US West states that the trial will, in part, be used to determine the type of basic video dialtone ONA services it will provide.

In addition, US West describes its plans for complying with the Commission's conditions for conducting enhanced services market trials without filing comparably efficient interconnection (CEI) plans and market trial waivers. *See BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services*, 4 FCC Rcd 1266 (1989). US West adds, however, that it may exceed the eight month period allowed for market trials because the trial will be conducted at the same time as the basic market trial authorized by the *Section 214 Order*, which provides a twelve month time period for trials. Commission in December. US West requests a waiver of the eight month time period if the Commission finds that such a waiver is necessary. US West plans to start the market trial ninety days from the date of its notification or after the tariff for the basic video dialtone service has taken effect, whichever comes later.

Interested parties should file comments on US West's filing by **July 14, 1994**, and reply comments by **July 25, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. US West's filing is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington,D.C. 20554. Copies also can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii Puerto Rico and the Virgin Islands — RM 4436

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1994; Released: May 24, 1994

By the Commission:

I. INTRODUCTION

1. On October 26, 1993, the Federal-State Alaska Joint Board (Board) adopted the *Final Recommended Decision* in CC Docket 83-1376.[1] The *Final Recommended Decision* presents a carefully integrated plan to meet the five objectives that it recommends should govern interstate telecommunications services betweenAlaska and the contiguous states ("Lower 48") and between Alaska and Hawaii. We hereby adopt these five objectives and agree with the Joint Board that, based on the record, the *Final Recommended Decision* best achieves these five objectives: preservation of universal service; continuation of rate integration;[2] maintenance of revenue requirement neutrality;[3] allowance of market-based competitive entry; and encouragement of increased efficiency.

2. We also conclude that implementation of the new market structure recommended by the Board will increase competition and will further economic growth in Alaska by lowering prices and stimulating demand for telecommunications services. Economic growth will be enhanced because the new market structure will stimulate, through lower prices, and facilitate, through new services, transactions between consumers and businesses in the state of Alaska and the rest of the nation. Increased competition should also encourage additional investment in the Alaska telecommunications infrastructure. Under this new market structure, we conclude that businesses and consumers can enjoy these benefits at the same time we preserve universal service, revenue requirement neutrality, and rate integration. In this order we thus adopt, with clarifications and minor modifications, the recommendations of the Board and establish implementation requirements.

II. Summary of the Final Recommended Decision

3. In the *Final Recommended Decision*, the Board concluded that the Joint Services Arrangement (JSA) should be terminated, subject to the adoption and implementation of suitable transition mechanisms.[4] Under the recommended market structure, the American Telephone & Telegraph Co. (AT&T) would provide MTS services between Alaska and the Lower 48 (northbound and southbound), and between Alaska and Hawaii, at integrated rates and under the terms and conditions applicable to AT&T's provision of services in the Lower 48. After the JSA terminates, Alascom, Inc. (Alascom) could offer interstate MTS independently from AT&T under its own tariff and with no obligation to charge AT&T's integrated rates.

4. Under the *Final Recommended Decision*, Alascom would provide interexchange carriers (IXCs) common carrier services under tariff offered on a non-discriminatory basis at rates that reflect the costs of services.[5] Alascom's tariff would have separate rate schedules for locations subject to facilities competition (non-Bush) and for locations where Alascom has a facilities monopoly (Bush). The costs of service in each of these categories would be defined pursuant to a cost allocation plan developed by Alascom and approved by the Commission.

5. The *Final Recommended Decision* also contemplates that Alascom would continue to provide interstate private line service upon reasonable request under its existing federal tariffing and Section 214 obligations. If AT&T provides interstate private line service to or from Alaska, it would be required to do so under the same rate structures, terms, and conditions that apply to its provision of private line services between other states.

6. The Board recommended a four-year transition period, beginning March 1, 1994. During the transition, AT&T would be required to purchase certain services from Alascom to meet its MTS obligations. There would be two phases to the transition period, with the first phase beginning on March 1, 1994, and the second phase beginning on September 1, 1995. During the first phase, AT&T would continue to obtain services from Alascom under the JSA

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[1] Alaska Joint Board Final Recommended Decision, FCC 93J-2 (released October 29, 1993) (*Final Recommended Decision*). *See also* Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico, and the Virgin Islands, CC Docket No. 83-1376, RM 3376, Alaska Joint Board Tentative Recommendation, 8 FCC Rcd 3684 (1993) (*Tentative Recommendation*).

[2] The Commission's rate integration policy requires the integration of rates for interstate message telephone service and wide area telecommunications service to and from Alaska into AT&T's domestic rate pattern. In this order, those services are hereinafter referred to as MTS. Establishment of Domestic Communications Satellite Facilities, 35 FCC 2d 844, 856-57 (1972), *aff'd on recon.*, 38 FCC 2d 665 (1972), *aff'd sub nom. Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

[3] The Joint Board has described its objective of revenue requirement neutrality as implementing changes in the Alaska market structure "without generating any material increase in the intrastate revenue requirement." *Supplemental Order*, 4 FCC Rcd 395 (1989).

[4] *Final Recommended Decision*, FCC 93J-2 at paras. 2-10.

[5] Alascom common carrier services are all interstate interexchange transport and switching services that are necessary for other interexchange carriers to provide services in Alaska up to the point of interconnection with each Alaska local exchange carrier.

for one and one-half years. On September 1, 1995, the JSA would terminate and Alascom's common carrier services would be offered to carrier customers under tariff. During the second phase of the transition period, lasting two and one-half years, AT&T would be required to purchase a fixed amount of common carrier service from Alascom, defined as a percentage of a baseline revenue level. This obligation would decline to zero at the end of the second phase.

7. Finally, under the *Final Recommended Decision,* AT&T would make a $150 million transition payment (in two installments of $75 million each) to Alascom that would be applied to reduce Alascom's total plant accounts.[6]

III. Commission Adoption of the Alaska Joint Board's Final Recommended Decision

8. The Commission has wrestled for over 20 years with the question of what type of telecommunications market structure for Alaska would best serve the public interest.[7] Over this time period there have been significant changes in the domestic telecommunications market in terms of the number of carriers that provide interstate service, the types of services they provide, and the technologies they use to provide telecommunications services. While these changes have been occurring nationally, the Commission has continued to search for the market structure that will best meet the needs of Alaskan consumers of telecommunications services, incorporate into Alaska telecommunications the changes that have occurred nationally, and harmonize rate integration, competitive policies, and universal service objectives in Alaska.

9. In 1985, the Commission referred questions concerning the appropriate market structure for providing Alaska MTS to a Federal-State Alaska Joint Board created pursuant to Section 410(c) of the Communications Act. These questions have been under review by the Board for over eight years. The Board has collected vast quantities of data, received extensive comments from interested parties, reviewed numerous proposals on this subject, and held a public hearing. The *Final Recommended Decision* sets forth the market structure plan for Alaska that the Board believes best balances its five public interest goals. We conclude that this new market structure will allow Alaskan telecommunications consumers to derive benefits from the changes in telecommunications services that have occurred over the last twenty years. We concur with the Board's evaluation of the record, and the legal and policy analyses and recommendations that are presented in the *Final Recommended Decision.*

10. We agree with the legal analysis in the *Final Recommended Decision* that concludes that we have ample authority under the Communications Act to implement the Board's specific transition mechanisms.[8] We conclude that, based on the record, the Board's recommendations, with modifications and clarifications in this order, are in the public interest as expressed in Sections 1, 201, and 202 of the Communications Act, because they provide a comprehensive solution to the market structure issues referred to the Board and because they best achieve the five objectives the Board adopted earlier and that we adopt in this Order. We conclude that the new market structure, and the transition mechanisms included as part of the comprehensive solution, are essential elements to that overall plan of ensuring universal service for Alaska consumers, consistent with the Communications Act and the Alaska Joint Board's *Final Recommended Decision.*

11. We conclude that the resulting market structure will enhance competition, thereby increasing the availability of new services at lower prices for Alaska telecommunication consumers. We conclude that more of the benefits that consumers have derived from competition in the Lower 48 should be available to Alaskans. Competitive markets encourage carriers to adopt new technologies, develop new and innovative services, reduce costs by eliminating waste, provide service more efficiently, and improve customer service. Increased competition should ensure that there is continuing investment in the telecommunication infrastructure for Alaska both for existing and new services.

12. Although the Alaska MTS market was open to competition in 1982,[9] we believe that because of limitations created by the JSA the present market structure does not produce all the benefits available from a competitive market.[10] AT&T, a major competitor in the MTS market, is unable to build facilities in Alaska or serve Alaska independently because of the requirements of the JSA. AT&T may not take advantage of offerings of other carriers and

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[6] In the *Final Recommended Decision,* the Alaska Joint Board recommended maintaining the current cost separations factor for circuit equipment for Alascom and United Utilities, Inc. (UUI). The Alaska Joint Board also recommended against establishing the Alaska Fund proposed in the *Tentative Recommendation.*

[7] As early as 1972, the Commission concluded that AT&T should use domestic satellites to provide interstate MTS service, in conjunction with local carriers, to Alaska, Puerto Rico, and Hawaii to implement rate integration to these areas. *Establishment of Domestic Communications Satellite Facilities,* 35 FCC 2d 844 (1972), *aff'd on recon.,* 38 FCC 2d 665 (1972), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975). In 1981, AT&T and Alascom began providing interstate MTS service to and from Alaska under the JSA. In 1982, the Commission rejected Alascom's claim to an exclusive right to provide interstate MTS, concluded that an open entry policy for Alaska interstate MTS was in the public interest, and authorized competitive entry into the Alaska interstate MTS market for non-bush locations (areas where facilities competition is allowed). *MTS & WATS Market Structure Inquiry (Phase II),* 92 FCC 2d 787 (1982) *recon . denied,* FCC 83-213 (released May 9, 1983). Full rate integration was implemented in Alaska effective January 1, 1987. *Memorandum Opinion and Order,* CC Docket No. 83-1376, FCC 86-602 (released January 2, 1987). The JSA arrangement was continued between AT&T and Alascom while rate integration was implemented in Alaska and while the Alaska Joint Board evaluated alternative market structures. *Notice of Proposed Rulemaking,* CC Docket No. 83-1376, FCC 85-520 (released September 27, 1985).

[8] *Final Recommended Decision,* FCC 93J-2 at paras. 114-127. We agree with the analysis in the *Final Recommended Decision* rejecting the claims that the Alaska Joint Board committed various procedural errors in reaching its final recommendation to the Commission. *Final Recommended Decision,* FCC 93J-2 at paras. 151-78.

[9] *MTS and WATS Market Structure Inquiry, (Phase II),* 92 FCC 2d 787 (1982), *recon. denied,* FCC 83-213 (released May 9, 1983).

[10] In opening the Alaska market to competition we concluded that the benefits of competition achieved by eliminating barriers to entry in other markets, including "the provision of service at the lowest possible cost, the reduction or elimination of waste, making carriers more responsive to the needs and desires of consumers, and making carriers respond more rapidly and efficiently to technological change and innovation," were also applicable to Alaska. *Id.*

must instead purchase all of its Alaska switching and transport services from Alascom. Alascom gains a competitive advantage because it has an assured revenue source, AT&T, that must pay all of Alascom's interstate costs, plus AT&T's own rate of return (under price cap regulation) regardless of Alascom's efficiency or market conditions.[11] Thus, the JSA makes it more difficult for carriers other than Alascom to compete effectively in Alaska.[12] The JSA also diminishes some of the rigor of a competitive market that would otherwise encourage Alascom to eliminate any potential waste and service inefficiencies. We conclude that the market structure in Alaska should be restructured to promote more competition, open entry, and improve efficiency subject to transition mechanisms that will enable the new market structure to develop without causing significant rate increases in Alaska. Accordingly, in this order, pursuant to Sections 1, 4(i)-(j), 201-203, 214, and 220 of the Communications Act,[13] we adopt the Board's *Final Recommended Decision* with clarifications and minor modifications and establish dates for some of the implementation requirements.[14]

IV. Modifications to, and Clarifications of, the Recommendations in the Final Recommended Decision

13. After reviewing the *Final Recommended Decision,* we have concluded that we must modify and clarify our understanding of some of the Joint Board's recommendations to ensure that the new market structure will operate in the public interest. In our judgment, these clarifications and modifications are consistent with the objectives established by the Board and are consistent with the reasoning contained in the *Final Recommended Decision.*[15] The State Joint Board Members have participated in the deliberations on this order, pursuant to Section 410(c) of the Communications Act.

A. Transition Payment and Reduction of Alascom Plant Accounts

14. In the *Final Recommended Decision,* the Joint Board recommended that in applying the transition payment installments, the "Central Office Switching" Account 2210 should be designated first for reduction and then should be reduced by an amount that would result in little or no intrastate cost shift if AT&T decreased its usage of Alascom switches.[16] Consistent with the Joint Board's objective of reducing Alascom's plant balances to reduce potential intrastate cost shifts, we clarify that the amount necessary to reduce Central Office Switching so as to produce little or no increase in intrastate revenue requirements be taken entirely from the first $75 million installment. The remaining depreciable accounts will be reduced proportionately using both the balance of the first installment and all of the second $75 million installment. As a result, the potential for significant intrastate cost shifts if AT&T decreases its usage of Alascom switches will be significantly diminished at the time of the first installment.

15. The *Final Recommended Decision* did not consider how AT&T will account for the $150 million payment to Alascom. We conclude that the cost increase associated with the payment made by AT&T to Alascom is an extraordinary cost beyond the control of AT&T that is eligible for exogenous treatment under Section 61.44(c)(5) of our price cap rules,[17] and direct AT&T to make preliminary filings forty-five days prior to filing tariff modifications that reflect AT&T's transition payment. AT&T shall include in its tariff filings the apportionment and explanation of the exogenous revenue requirement effects of each payment upon each rate that AT&T proposes to modify as a consequence of this decision, and shall also include in that filing the anticipated cost reduction associated with the termination of the JSA.

B. AT&T's Purchase of Alascom's Services

16. The Board recommended that during the second phase of the transition AT&T should be obligated to purchase a fixed dollar amount of service from Alascom. The fixed dollar amount of service would decline in six month increments until it reached zero at the termination of the second phase of the transition period. The Board recommended this continuing obligation after the JSA terminates to avoid precipitous intrastate cost shifts if AT&T does not continue to purchase Alascom services. The Board concluded that the AT&T must purchase requirement along with other transition mechanisms will maintain the goals of universal service and revenue neutrality. We adopt these goals and the approach recommended by the Board, but

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[11] AT&T estimates that the current shortfall of revenues for service under the JSA is approximately $80 million. *Final Recommended Decision,* FCC 93J-2 at para. 24, n.25.

[12] We note that at present General Communications, Inc. (GCI) is the only other facilities-based MTS provider in Alaska.

[13] 47 U.S.C. §§ 151, 154(i)-(j), 201-203, 214, and 220.

[14] Because we adopt the Alaska market recommendation of the *Final Recommended Decision* , we dismiss as moot the GCI petition, filed January 29, 1992, requesting a new proceeding to establish a new Alaska market structure.

We also dismiss as moot AT&T's Petition for a Lawfulh) Interim Division of Charges, filed November 5, 1987. The AT&T petition requested that the Commission find the existing settlement agreement under the JSA between AT&T and Alascom unlawful under Section 201 of the Communications Act. In this order we conclude that it is in the public interest to adopt the recommendation in the *Final Recommended Decision* that the JSA be terminated after a suitable transition period. We concur with the analyses in the *Final Recommended Decision* that it is within our authority to establish transition mechanisms to ensure the availability of universal service. The continuation of the JSA for the first phase of the transition period is an integral part of the overall plan for a new market structure in Alaska, which includes terminating the JSA, and important to achieving the objectives of revenue neutrality and universal service recommended by the Alaska Joint Board. Ultimately, the termination of the JSA is also important to achieving these objectives. Thus, we conclude that it is unnecessary for us to evaluate the lawfulness of the JSA as requested by AT&T in its petition.

[15] In this order, we modify the date recommended by the Joint Board for the beginning of the transition (March 1, 1994) to adjust for the period that the Joint Board's recommendations were under consideration. Because the first phase of the transition will begin July 1, 1994, other dates have been adjusted to provide for a one and one-half year first phase and a two and one-half year second phase.

[16] *Final Recommended Decision,* FCC 93J-2 at para. 136.

[17] *See* 47 C.F.R. § 61.44(c)(5) (1992).

conclude that the fixed dollar amount AT&T must purchase as calculated using the Board's methodology must be adjusted as discussed below.

17. In the *Final Recommended Decision* the Board recommended the following methodology for calculating the fixed dollar amount of service that AT&T must purchase during the second phase of the transition period. The amount that AT&T must purchase for each period of the second phase was to be computed by applying a declining percentage for each six month period to a baseline revenue amount. The annual baseline revenue amount was to be calculated as a function of the demand for interstate transport and switching MTS minutes for the last 12 months that the JSA was in effect, multiplied by the new tariff rates for Alascom's Common Carrier Services.[18] The percentage used to calculate the fixed dollar amount of service for each six month period was to decline to zero in six month increments.[19] The required percentage for each six month period was to be applied to one-half of the annual revenue baseline to calculate the fixed dollar amount of services AT&T must purchase for each six month period.

18. AT&T states that the must-purchase requirement "would require AT&T to pay for services which it may not be able to use."[20] AT&T argues that the only way to interpret the must-purchase requirement in the *Final Recommended Decision* is to equate the demand used to calculate the annual baseline revenue with the AT&T demand for interstate services for which AT&T bills pursuant to its own tariffs during the last 12 months of the JSA. Alascom argues that the Board intended the demand calculations to be based on the jointly provided services provided by both AT&T and Alascom.[21]

19. We conclude that the must-purchase requirement applies to the total demand to and from Alaska under the JSA for interstate transport and switching MTS minutes for the last 12 months that the JSA was in effect rather than just AT&T's demand under the JSA. The Alaska Joint Board recommended a continuing obligation for AT&T to purchase some services from Alascom during the second phase of the transition to avoid precipitous shifts of Alascom's costs to the intrastate jurisdiction after termination of the JSA that could result from a sudden decrease in the use of Alascom facilities by AT&T for the provision of interstate MTS.

20. We conclude, however, that we should modify the Board's recommendation in this area in two respects in order to achieve the Board's objectives. We modify the method of calculating the fixed dollar amount of services that AT&T must purchase in order to address factors that the Board did not consider when it selected its recommended methodology. Without the modification we now make, the fixed dollar amount that AT&T must purchase could give Alascom windfall payments over and above what is necessary to address the Board's concern about possible intrastate cost shifts. As noted *supra*, the State Joint Board members have participated in reaching this conclusion. Thus, we require two adjustments to the fixed dollar amount that AT&T must purchase that is calculated using the Board's recommended methodology.

21. First, intrastate cost shifts are not likely to occur if Alascom separately provides significant interstate traffic after the JSA is terminated. Indeed, in these circumstances, AT&T may not be able to purchase the required fixed dollar amount of services from Alascom to fulfill the recommended post-JSA traffic loading requirement. Since in this case Alascom's use of its own facilities will help address the Board's concern about intrastate cost shifts, the fixed dollar amount that AT&T must purchase for each six month period should be adjusted to reflect Alascom and AT&T's relative interstate use of those facilities. Thus, the fixed dollar amount for each six month period during which AT&T must purchase services from Alascom, as calculated using the Board's recommended methodology, must be adjusted to reflect the proportion of minutes of interstate use by Alascom and AT&T.[22]

22. Second, after the JSA terminates, Alascom likely will be obtaining revenues under tariff or through leases from carriers for use of its facilities to provide interstate MTS. The revenues associated with new services purchased by other interexchange carriers must be deducted from AT&T's obligation to purchase Alascom services.[23] This deduction recognizes that new uses of Alascom's facilities by other interexchange carriers (for the provision of MTS services) achieves the same policy goals as similar purchases made by AT&T. Thus, the total of all MTS-related purchases by AT&T and new services purchased by other carriers when added together must meet the fixed obliga-

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[18] These new tariffs, as noted elsewhere in this order, would reflect Alascom's reduced costs after application of the transition payment installments.

[19] The percentage of the baseline revenue amount to be used for each six month period is as follows: 90% during the first period; 80% during the second period; 65% during the third period; 45% during the fourth period; and 20% during the last period. *Final Recommended Decision*, FCC 93 J-2 at n.181.

[20] *Ex parte* letter from Karen Jeisi, AT&T, to William F. Caton, Acting Secretary, FCC, dated December 28, 1993.

[21] Opposition of Alascom, January 12, 1994.

[22] The required adjustment is to be computed by applying the proportion (percentage) of MTS minutes to and from Alaska, provided by AT&T, in that six month period, relative to all the interstate MTS minutes to and from Alaska provided in that six month period, by AT&T and Alascom, to the unadjusted calculated fixed dollar amount for each six month period. For example, for each six month period, if AT&T carries 60% of the total interstate MTS minutes to and from Alaska carried by AT&T and by Alascom, then AT&T would pay 60% of the unadjusted fixed dollar must purchase amount for that six month period.

[23] For purpose of this order, the term "new services" refers to purchases of Alascom interstate services used for the purpose of providing MTS, under lease or contract, by IXCs, other than AT&T, that exceeds the level of services purchased over the last twelve months ending January 1, 1996. Examples of new services would be new leases and tariff services not otherwise offered under lease prior to January 1, 1996. Other examples would be increases in contracts above the levels purchased as of the last 12 months ending on January 1, 1996. If contracts existing as of January 1, 1996 are replaced by tariffs, only the increase above levels purchased as of the last twelve months ending January 1, 1996 would be considered new services. When calculating AT&T's must purchase requirement for any 6 month period, new services would be determined based on purchases by other IXCs in that 6 month period that exceed one-half the level of purchases over the last twelve months ending January 1, 1996.

tion identified in the "must purchase requirement.[24] Again, actual interstate use of Alascom's facilities addresses the Board's concerns about intrastate cost shifts. Additional payments would unnecessarily burden AT&T and provide Alascom with revenues over and above that needed to address these concerns. Thus, the AT&T purchase level as calculated using the Board's recommended methodology, and as adjusted for the proportion of MTS minutes provided by AT&T and Alascom, must be adjusted also for any revenues received by Alascom for new services purchased by other interexchange carriers for use of its interstate MTS facilities to provide interstate MTS.[25]

C. Alascom's Common Carrier Tariff

23. The *Final Recommended Decision* stated that Alascom should be required to file a common carrier services tariff with two geographic rate zones. To implement this recommendation, we establish filing dates and other requirements. In order to process Alascom's common carrier services tariff by the required effective date, we require that Alascom file its tariff and cost support information[26] 120 days before the scheduled effective date for that tariff of January 1, 1996, because a lawful tariffmust be on file prior to termination of the JSA.[27] The tariff must be revised annually thereafter on the schedule set forth in Section 69.3(a) of the Commission's Rules.[28]

24. The *Final Recommended Decision* did not recommend a rate of return that Alascom should use in computing a revenue requirement for the common carrier service tariff.[29] We conclude in this order that for purposes of computing the revenue requirement for Alascom's common carrier tariff, Alascom shall use the authorized interstate rate of return applicable to local exchange carriers (LECs) unless Alascom, by clear and convincing evidence, is able to justify a different rate of return for its interstate operations.[30]

D. Other Modifications and Clarifications

25. AT&T has been providing interstate service to and from Alaska at integrated rates in conjunction with Alascom under the JSA. The Commission requires AT&T to provide interstate MTS service at integrated rates pursuant to the Commission's rate integration policy and Sections 201(a) and 4(i) of the Communications Act. In the *Final Recommended Decision*, the Alaska Joint Board recommended that AT&T be required to provide interstate service to and from Alaska after the JSA is terminated. In this order, we adopt that recommendation and require that after the JSA is terminated, AT&T must provide interstate service at integrated rates to and from Alaska under the same terms and conditions, including service quality, technical standards, and availability, that it provides those services in the Lower 48 states. The Alaska Joint Board did not, however, address AT&T's potential need to request equal access from Alaska LECs. With the termination of the JSA, AT&T will directly provide service to subscribers in Alaska. AT&T does not currently have the same type of access to LECs in Alaska as it did in the Lower 48 when equal access was implemented, since it has been providing service to the customers of Alaskan LECs only through Alascom's facilities. In the Lower 48, because AT&T already had "equal access" to the LECs, the Commission required LECs to implement equal access only in response to requests from other interexchange carriers.[31] We conclude that, because in Alaska AT&T does not have physical connections to the LECs equivalent to equal access, LECs will have to implement equal access in response to requests from AT&T as well as in response to requests from other interexchange carriers in Alaska. [32] Accordingly, AT&T may request equal access from Alaska LECs in order to provide interstate service in Alaska. The ability to request equal access will ensure that AT&T has more flexibility in providing service in Alaska.[33]

26. In the *Final Recommended Decision*, the Board stated, in support of its recommendation to retain the frozen circuit equipment allocation factor, that the factor at issue

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[24] All interstate services purchased under lease or contract by AT&T from Alascom may be used to meet AT&T's fixed dollar obligation, so long as those services are employed to provide interstate MTS service.

[25] If requested by the Commission, AT&T and Alascom must provide all relevant information to include, at a minimum, the interstate MTS minutes and the tariff and lease revenues used to calculate the fixed dollar amount AT&T must purchase, including the adjustments we require herein. Both parties also must retain supporting documentation on interstate minutes and contract and tariff revenues for potential audit by the Commission.

[26] 47 C.F.R. Section 61.38 (1992). Alascom is required to file in its tariff the minimum quality of service standards that it will employ for the provision of its common carrier services.

[27] As recommended by the *Final Recommended Decision*, the Alascom common carrier services tariff must reflect Alascom's costs after application of the $150 million transition payment. *Final Recommended Decision*, FCC 93J-2 at n.180.

[28] 47 C.F.R. §69.3(a).

[29] In the *Tentative Recommendation*, however, the Alaska Joint Board recommended either the authorized interstate rate of return applicable to local exchange carriers or the intrastate rate of return authorized for switched traffic in Alaska, whichever was lower. Alternatively, Alascom could propose another rate of return with justification.

[30] *See Tentative Recommendation*, 8 FCC Rcd at 3692, n.57.

[31] The equal access requirements discussed herein are the same equal access requirements that apply to independent telephone companies in the rest of the nation. In the Matter of MTS and WATS Market Structure, Phase III: Establishment of Physical Connections and Through Routes among Carriers; Establishment of Physical Connections by Carriers with Non-Carrier Communications Facilities; Planning among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing, CC Docket No. 78-72, Phase III, Report and Order, 100 FCC 2d 860; Memorandum Opinion and Order, FCC 86-4 (released January 3, 1986) at para 28.

[32] *See* MTS and WATS Market Structure, 94 FCC 2d 292 (1983); Phase III Report and Order, 100 FCC 2d 860 (1985) *recon. denied*, FCC 86-4 (released January 8, 1986).

[33] The requirement that LECs implement equal access in response to requests by AT&T and other carriers does not alter the Commission's Bush policy that prohibits carriers other than Alascom from building facilities in the Bush. *See* Earth Stations re Tentative Decision to Establish Joint Ownership, 92 FCC 2d 736 (1982); Policies Governing the Ownership of Domestic Satellite Earth Stations in the Bush Communities in Alaska, CC Docket 80-254, RM-3304, 96 FCC 2d 522, 541 (1984).

applies equally to AT&T and Alascom.[34] We clarify here that the frozen factor development procedures shown in Section 36.126(d)(3) of the Commission's rules do apply equally to AT&T and Alascom because they are both interexchange, not exchange, carriers.[35] However, the actual calculated frozen factor is not the same for each carrier because it is based on carrier-specific usage data.

27. The State of Hawaii cites various portions of the *Final Recommended Decision* as conflicting with Commission orders on rate integration.[36] We clarify in response to concerns of the State of Hawaii that in this order we do not adopt any change in definition of rate integration or its applicability, as required in prior Commission orders. We merely change the market structure by which rate integration is achieved for interstate services to and from Alaska. To eliminate any possible misunderstanding, we also emphasize that this order only pertains to MTS services and does not include private line services.

V. Alascom's "Opposition" to the Final Recommended Decision

28. Alascom filed an Application for Review of the *Final Recommended Decision* on November 29, 1993, under Section 1.115 of the Commission's rules. AT&T and GCI argue that Section 1.115 applies to a final action taken pursuant to delegated authority under Section 5(c) of the Communications Act and that the Alaska Joint Board's actions were taken pursuant to Section 410(c) of the Act and do not constitute final actions taken pursuant to delegated authority.[37] We agree with AT&T and GCI that Alascom's filing is improper under Section 1.115 of our rules.[38] Accordingly, we dismiss Alascom's petition.[39] We, however, will address on our own motion, certain matters raised by Alascom's pleading.

29. In its pleading Alascom makes a number of charges regarding supposed substantive and procedural infirmities in the Alaska proceeding.[40] For the most part, these arguments were thoroughly discussed and rejected in the *Final Recommended Decision*. We incorporate by reference the Joint Board discussion on substantive and procedural issues and, unless noted otherwise, we adopt the Joint Board's analysis as our own. Nevertheless, we think that some of the matters raised by Alascom deserve further attention here.

A. Alascom's Substantive Arguments

30. Alascom claims that the Board has "elevated the policy goals of efficiency and competition," above other Board objectives.[41] There is no merit to Alascom's claim. First, we do not agree that efficiency and competition are lesser objectives than the other Board objectives. As stated in the Board's *Supplemental Order* tentatively adopting these objectives, "a proper resolution of the issues before us must represent a balanced effort to achieve each of these goals.[42] Second, we find that the Board has balanced the five Board objectives in a manner that best serves the public interest. The Board has addressed the efficiency and competition objectives by recommending the termination of the JSA. It has addressed the objectives of universal service and revenue requirement neutrality by recommending several transition mechanisms including the continuation of the JSA for the first phase of the transition period, the AT&T payment of $150 million to Alascom, and the AT&T second phase must-purchase requirement. Thus, the Board's recommendations will not affect the Commission's policy on rate integration for interstate MTS services for Alaska.

31. Alascom's claim that the Board must identify "relevant, material changes of fact" before it can "justify radical restructuring of the Alaska telecommunications market structure, including the termination of the JSA" is unsupported. It is well settled that an agency may take such action, "'either with or without a change in circumstances,'"[43] as long as it supplies a " 'reasoned analysis' of its decision."[44] The Joint Board has supplied a "reasoned analysis" for its proposal and we adopt it as our own. Moreover, we disagree that circumstances have not changed in Alaska. This entire proceeding is a result of changes in the Alaska market: in 1972, the rate integration policy was adopted for Alaska, in 1980, Alascom and AT&T entered into the JSA, and in 1982, the Alaska market was opened to competition. Indeed, the Joint Board was formed for the express purpose of addressing the harmonization of competition in Alaska with rate integration, and the proposals it makes are consistent with that task. Thus, contrary to Alascom's claim, significant changes have occurred in the Alaska market, and Alascom's objection is without merit.

32. Alascom contends that the proposed market structure "eliminates the foundation for the frozen allocator, destroying any reasonable prospect to preserve revenue requirement neutrality."[45] We disagree with Alascom's arguments. First, the Board recommended retaining the frozen allocator specifically to prevent potential intrastate cost shifts that Alascom reported in its proposed implementation plan, and which Alascom estimates are worth approximately $30 million annually. Second, contrary to Alascom's claim that it will not have interstate business, after termination of the JSA, Alascom will remain free to provide interstate services independently and to supply interstate common carrier services to all other IXCs. In addition to retaining the frozen allocator, the Board recom-

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[34] *See Final Recommended Decision*, FCC 93J-2 at para. 92.

[35] 47 C.F.R. §36.126(d)(3).

[36] *Ex parte* letter from Herbert E. Marks and Andrew W. Cohen, to William F. Caton, Acting Secretary, FCC, November 19, 1993.

[37] AT&T filed an Opposition (December 10, 1993) and GCI filed a Motion to Strike Application for Review (December 14, 1993).

[38] *See* 47 U.S.C. § 410(c); 47 CFR § 1.115 (1992).

[39] We also dismiss Alascom's related motion (November 29, 1993) to exceed the page limitation provided in Section 1.115(f)(1) of the Commission's rules, 47 C.F.R. § 1.115(f)(1).

[40] AT&T opposes Alascom's claims and reserves the right to respond further when these claims are raised properly. AT&T Opposition at 2 n.4 . GCI does not respond to Alascom's substantive claims, arguing that Alascom raises issues that were already raised in the *Final Recommended Decision* and elsewhere in this proceeding. GCI Contingent Opposition at 2, n.2.

[41] Alascom Application for Review at 3.

[42] *Supplemental Order*, 4 FCC Rcd at 398, para. 24.

[43] *Center for Science v. Dept. of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986), *quoting Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

[44] *Id.*.

[45] Alascom Application for Review at 5.

mended the continuation of the JSA during the first phase of the transition period, a $150 million payment by AT&T to Alascom to reduce Alascom's plant accounts and the AT&T must-purchase requirement to preserve revenue requirement neutrality. We are convinced that these recommendations as part of the Board's comprehensive solution will preserve revenue requirement neutrality.

33. In addition, we note that the Part 36 frozen allocator procedures apply to other IXCs, AT&T, and UUI, not just Alascom. The Docket 80-286 Joint Board retained a distance sensitive allocator for the IXCs to recognize the extent of distance sensitive circuit equipment in service for those carriers, and to avoid the substantial adverse revenue requirement impact associated with the adoption of a nondistance sensitive allocator.[46] In its *Report and Order*, the Commission agreed with the Docket 80-286 Joint Board's recommendation that a distance sensitive allocator, frozen at 1985 levels, be retained for use by the IXCs.[47] In addition to our concern for intrastate cost shifts, we support this Board's recommendation to leave the frozen allocator intact recognizing the broader considerations which caused it to be retained for Alascom and other IXCs in 1987 by another Joint Board.

34. Alascom argues that universal service in the Bush is more tenuous under the *Final Recommended Decision* because the Board cannot assume that AT&T would be responsible for satellite service to the Bush. Alascom further contends that universal service in the Bush will be undermined because Alascom, not AT&T, is the only carrier that has constructed, launched, and operated a satellite for Alaska service.[48] Alascom's concern about AT&T's provision of service to the Bush appears disingenuous since this service is now, and remains, Alascom's responsibility.[49] The Board's recommendations do not address or otherwise reduce Alascom's current obligation to provide satellite service on a monopoly basis nor do the Board's recommendations lift the Commission prohibition against construction of earth station facilities in the Bush by companies other than Alascom. Alascom may not ignore, evade, or transfer its responsibility to provide rural Alaska satellite service without first obtaining Commission approval under Section 214 of the Communications Act to discontinue service. To approve a Section 214 request by Alascom to discontinue service, the Commission would have to find that "neither the present or future public convenience and necessity will be adversely affected." Both AT&T and GCI have offered to provide service to the Bush if Alascom no longer desires to serve as the monopoly provider to the Bush.[50] However, if no other carrier was willing to assume Alascom's responsibilities to serve the Bush voluntarily, the Commission would, pursuant to Sections 1, 201, 205, and 214 of the Communications Act, require another carrier, such as AT&T, to provide service by satellite or other appropriate technology.

35. Alascom also incorrectly argues that replacing the JSA with the new market structure will somehow undermine its ability to provide satellite service. We conclude that this contention is incorrect for several reasons. First, Alascom, as the facilities-based carrier for the Bush, will be able to recover the cost of furnishing service to that region. Other carriers must use Alascom's facilities to provide service to the Bush. As required in this order, Alascom will tariff interstate access to the Bush separately so that related costs, including the costs of the satellite, are borne by all interstate carriers using Alascom's Bush facilities. Second, AT&T must pay Alascom $150 million to reduce its plant accounts. This payment will make Alascom more competitive. Third, we have retained the jurisdictional separations frozen allocator, which would assign 86% of circuit equipment investments and expenses, including a new satellite, to the interstate jurisdiction. Finally, we have required AT&T to purchase a fixed amount of common carrier services from Alascom during the second phase of the transition period. Thus, Alascom has not demonstrated that its ability to provide telecommunications service in Alaska will be undermined by the competitive environment under the new market structure.[51]

36. Alascom also argues that: 1) AT&T will not be harmed by continuing the JSA; 2) there will not be benefits from eliminating the JSA; 3) if other carriers want to provide service to and from Alaska, they have been able to do so under the current market structure; 4) the Alascom ARC plan is better than the Board's recommended market structure; and 5) Alascom is efficient and would be more efficient than AT&T in providing service in Alaska.[52] All of these issues have been raised previously in this proceeding, and the Board has previously addressed and rejected Alascom's arguments. We concur with the Board's interpretation of the record. The new market structure in Alaska will enable Alascom to compete with other interstate carriers on price and service. Consumers will benefit from reduced prices, additional providers, and new services. Ad-

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[46] *Recommended Decision and Order*, 2 FCC Rcd 2562-2565 (Joint Board 1987).

[47] *Report and Order*, 2 FCC Rcd, 2639 (1987).

[48] Alascom Application for Review at 9-15.

[49] The Commission prohibits carriers other than Alascom from building facilities to the Bush. *See* Earth Stations re Tentative Decision to Establish Joint Ownership, 92 FCC 2d 736 (1982); Policies Governing the Ownership of Domestic Satellite Earth Stations in the Bush Communities in Alaska, CC Docket 80-254, RM-3304, 96 FCC 2d 522, 541 (1984). The common carrier tariff rates charged by Alascom for service to the Bush must be just and reasonable and enable Alascom to recover the costs of replacing and maintaining the satellite and other equipment necessary to meet its interstate service obligation to the Bush.

[50] AT&T Reply Comments, July 12, 1993, at 7; GCI Petition, RM-7246.

[51] In an *ex parte* filing dated May 12, 1994, Alascom requests that the Commission establish a pleading cycle to address universal service issues regarding who will serve the Bush, how a satellite to serve the Bush will be financed, and whether revenues are sufficient to "maintain universal service at integrated rates and levels of quality enjoyed today." We deny Alascom's request. These issues were considered by the Joint Board in making its recommendations to the Commission on the new market structure for Alaska and have been addressed by parties commenting in this proceeding. As discussed above, the Joint Board has recommended, and we have adopted in this order, a number of mechanisms to ensure that universal service is available to the Bush areas of Alaska. Those mechanisms make provisions for satellite replacement, rate integrated interstate service to the Bush, and universal service to the Bush. Since Alascom has not requested, nor received, approval for a Section 214 application to discontinue service to the Bush, Alascom remains the carrier responsible for providing facilities in the Bush.

[52] Alascom Application for Review at 1-23.

ditional competition in Alaska under the new market structure will provide greater opportunity for AT&T to provide service independently, for other IXCs to take Alascom's common carrier transport services to provide interstate service to Alaska, and for consumers to receive lower prices and additional services than the current mandated structure under the JSA.

B. Alascom's Procedural Arguments

37. Alascom argues that the Commission erred in convening this proceeding pursuant to nonrestricted rulemaking procedures. This was not an error. In the *Final Recommended Decision* the Joint Board fully explained why Alascom's argument is not supported by the language of Section 410 or any other law.[53] Since we agree completely with the Joint Board's analysis, there is no reason to repeat that discussion now.

38. Alascom also is wrong in its contention that the D.C. Circuit's decision in *Sangamon Valley Television Corp v. USA*, 269 F.2d 221 (D.C. Cir. 1959), compels the use of the Commission's *ex parte* procedures applicable to restricted proceedings.[54] To the extent that *Sangamon Valley* still is good law,[55] this situation is plainly distinguishable. First, this proceeding is unlike *Sangamon Valley* because here the Commission and the Joint Board had *ex parte* procedures in place since the inception of the rulemaking to ensure that interested parties had ample opportunity to participate in the proceeding and to respond to all presentations made to decisionmakers.[56] Thus, under the *ex parte* procedures used in this proceeding, all written presentations and summaries of all oral presentations that go beyond the written comments have been placed in the public record. *See* 47 C.F.R. 1.1206. Over the course of this lengthy proceeding many parties, including Alascom, took advantage of these "permit but disclose" *ex parte* rules, and it is hard to see how Alascom can argue now that it was not accorded due process.

39. Second, the Alaska proceeding is not like *Sangamon Valley* because, as the Joint Board explained, this situation does not involve "conflicting claims to a valuable privilege." While the JSA is a private contract, it was "crafted and approved by the Commission on an interim basis."[57] Indeed, Alascom itself recognized in an earlier stage of the proceeding that the contractual arrangement was established only as a result of Commission regulatory action implementing steps to assure that rate integration would be provided to the Alaska interstate market.[58] The JSA does not confer any particular privilege on Alascom, as Alascom's authority to serve the Alaska interstate market is not derived therefrom. Moreover, Alascom has been on notice since the inception of this proceeding that the cost recovery arrangement provided by AT&T under the JSA was not likely to be permanent.[59]

40. Alascom's claim that it was somehow harmed by the Joint Board's use of nonrestricted procedures is especially curious because, at the outset of the proceeding, the Commission unequivocally put the public on notice that such procedures would be used. As Alascom acknowledges, the 1985 Order convening the Joint Board expressly classified the proceeding as a nonrestricted notice and comment rulemaking.[60] In fact, Alascom itself has taken full advantage of the *ex parte* rules at every stage of the proceeding, and only now complains that it was error for the Commission and Joint Board to employ them. One of the main purposes of providing notice of *ex parte* procedures at the commencement of proceedings is to obtain timely public comment on those procedures. In light of that, we believe it was incumbent upon Alascom to voice its complaints on this process in a much more timely manner. Alascom, however, remained silent on this issue until the eve of the Joint Board's recommendation. Accordingly, for all of the reasons stated here and in the *Final Recommended Decision*, we reject Alascom's tardy claims that incorrect procedures were used in this proceeding.

41. Likewise, Alascom's argument that the Sunshine Act was violated has no merit. The Joint Board explained in detail why a gathering of Joint Board members with no FCC commissioners present cannot properly be called a meeting for purposes of the Sunshine Act.[61] It also discussed why the same is true when only one FCC commissioner is in attendance, or when two FCC commissioners attend a non-deliberative portion of a gathering.[62] Since we are not faced with the various hypotheticals posited by Alascom in its Application, there is no reason to address whether the Sunshine Act might apply in such situations.[63]

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53 *Final Recommended Decision*, FCC 93J-2 at paras. 152-160.

54 See 47 C.F.R. 1.1208.

55 As the Joint Board stated in the *Final Recommended Decision*, "subsequent to *Sangamon Valley*, the Supreme Court admonished the courts not to force an agency to provide procedures more demanding than those required by statute or the Constitution absent extremely compelling circumstances.' *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). Such circumstances do not exist here." *Final Recommended Decision*, FCC 93J-2 at n.195. We note further that the Commission has construed *Sangamon Valley* to apply only to proceedings involving changes to the table of allotments. *In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentation in Commission Proceedings*, Gen Dkt No. 86-255, 2 FCC Rcd. 3011, para. 38 n.30 (1987). Alascom does not argue that this case has anything to do with such subject matter.

56 *See Notice of Proposed Rulemaking*, CC Docket No. 83-1376, FCC 85-520 (released Sept. 27, 1985), 50 Fed. Reg. 41714 (1985). *See also Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, FCC 82-106 (released May 5, 1982), 89 FCC 2d 36 (1982).

57 *Final Recommended Decision*, FCC 93J-2 at para. 28.

58 *See* Opposition of Alascom, Inc. to AT&T Petition for a "Lawful Interim Division of Charges" at 7, *citing Domestic Communications-Satellite Facilities*, 35 FCC 2d 844, 856 (1972); *aff'd. on recon.*, 38 FCC 2d 665 (1972); *aff'd. sub nom., Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

59 *See supra* note 7 and accompanying text. *See also* AT&T Comments on the Proposal of the State Members of the Federal-State Joint Board at 6 (Dec. 18, 1992).

60 Alascom Application for Review at 28.

61 *Final Recommended Decision*, FCC 93J-2 at para. 174.

62 *Id.* at paras. 175-76. Thus, despite Alascom's insinuations, the subject matter of the various meetings among the state members of the Joint Board has no relevance because the meetings were not subject to the Sunshine Act requirements.

63 While Alascom states that it believes that the full Joint Board met and deliberated in Washington D.C. in March 1993, it provides no basis for this allegation. In fact, no such meeting of the Alaska Joint Board occurred. From its pleading, it appears that Alascom inexplicably has confused the Alaska Joint Board with the Separations Joint Board convened in CC Docket 80-286, which did conduct an open meeting in Washington D.C. during the month of March 1993, after notice to the public. *See* Alascom Application for Review at Attachment A.

42. The remainder of Alascom's contentions with regard to the Sunshine Act stem from its mistaken impression that the FCC's *ex parte* rules and Sunshine "open meeting" rules are one and the same. The *ex parte* provisions, which are contained in Sections 1.1200 through 1.1216 of the Commission's rules, deal with contacts between the public and the Commission and specify certain time periods when such contact is prohibited (e.g., the Sunshine Agenda period). In contrast, the Sunshine rules, which appear in Sections 0.601 through 0.607 of the rules, implement the Sunshine Act and relate to the manner in which the FCC conducts its open meetings. Thus, Alascom's conclusion is incorrect that the language in the Order convening the Joint Board providing that state commissioners be considered FCC commissioners for purposes of the FCC's *ex parte* rules necessarily required Joint Board compliance with the Sunshine rules governing open meetings.[64] Alascom also is incorrect that the Joint Board was subject to the open meeting rules because it stated in the *Tentative Recommendation* that *ex parte* presentations would be permitted "except during the Sunshine Agenda period."[65] Simply stated, the imposition of the FCC's *ex parte* procedures in a Joint Board proceeding would not subject the Board to the Sunshine Act's open meeting requirements.[66]

43. Quoting language from the *Final Recommended Decision* that "only the full Joint Board (of which the FCC Commissioners are a minority) is authorized to make recommendations to the Commission," Alascom argues that the state members acted beyond their delegated authority when they held state member-only meetings and issued data requests. Even assuming arguendo that only the full Board may make "recommendations" to the FCC, it does not follow that the state members are precluded from "acting" altogether. We find no basis for Alascom's conclusion that the Communications Act or any other law prohibits the state members from conferring among themselves about Alaska issues or from asking for information from parties to the proceeding.[67]

44. Alascom further argues that the employment of Overland Consulting, Inc. (Overland) by the Alaska Public Utilities Commission (APUC) was tantamount to according the private consultants of other parties to the proceeding the status of Joint Board staff. There is no basis for this contention. At the outset, we note that just because the State of Alaska is responsible for the APUC's funding does not mean that the APUC stands in the shoes of the State, which is a party to this proceeding. Likewise, the APUC's payment of Overland's fees does not establish that Overland is acting on behalf of the state commission. Therefore, even assuming *arguendo* that the APUC filed comments in this docket, we do not think that, in the unique context of a Joint Board proceeding, such "advocacy" makes a difference.[68] All of the state decisionmakers on the Board are members of, and paid by, state commissions. The fact that a state commission may also act as a party on matters within its interest (*e.g.*, jurisdictional issues) does not mandate disqualification of the Joint Board member from that state. In contrast to its attack on Overland, Alascom does not argue, for example, that Commissioner Knowles or other members of her staff paid by the APUC should have been removed from the Board. For the purposes discussed herein, we see no distinction between Overland and Commissioner Knowles and her staff. This is especially the case when Alascom fails to point to any evidence demonstrating that the APUC controlled the activities of Overland or that Overland's actions were in any way distinguishable from those of other persons advising Commissioner Knowles. Indeed, one of the APUC submissions cited by Alascom shows just the opposite. In that letter, the APUC Chairman pointed out to Alascom that Overland was hired to assist Commissioner Knowles and staff member Lorraine Kenyon in their official Joint Board duties, and that Alascom's request for Overland's help in preparing data filings was a matter to be decided by the state members who issued the data requests, not by the APUC. The contents of this submission establish that Commissioner Knowles, in her Joint Board capacity, rather than the APUC or the State of Alaska, directed the activities of Overland.[69] We agree with the *Final Recommended Decision* that Overland was not representing an interested party to the proceeding and, therefore, its participation was not improper and did not, for example, constitute an impermissible *ex parte* contact.

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[64] We note that in some circumstances, Joint Board gatherings in this rulemaking proceeding clearly would be subject to the open meeting requirement, *e.g.*, when three FCC commissioners attend (a quorum of the Commission). Also, the meeting at which we considered the Board's *Final Recommended Decision* and adopted this order was subject to the open meeting requirement.

[65] Alascom Application for Review at 28-29.

[66] Alascom offers no support for its contention that the Joint Board meeting at which the *Final Recommended Decision* was adopted somehow evaded the purpose of the Sunshine Act because little debate or discussion occurred there, and we are unwilling to presume a violation of the Sunshine Act based on this bald assertion. Indeed, the October 26, 1993 open meeting was convened and conducted in accordance with the FCC's usual procedures.

[67] Even if Alascom is correct that the state members' data requests do not appear on the record, it is hard to see how it suffered any harm when, as Alascom acknowledges, the responses to the data requests are in the record.

[68] The joint APUC/State of Alaska pleadings referred to by Alascom all were filed in 1984-85, before the matters involved in this proceeding were referred to the Joint Board. And, while the APUC Chairman did make three submissions to the record in 1992 and 1993, these letters do not support Alascom's theory that the APUC acted as an advocate on the merits in this proceeding. The first two simply deal with matters of overlapping state/federal jurisdiction, and request that the Commission refrain from acting on matters under the APUC's authority. *See Ex Parte* Letters to Alfred C. Sikes, Chairman, FCC, to Don Schroer, Chairman, APUC, dated July 17, 1992 and December 18, 1992. The last letter answers a request from Alascom that the APUC Chairman intervene in the operations of the Joint Board to direct Overland to assist Alascom in responding to certain data requests. *See Ex Parte* Letter to John R. Ayers, Executive Vice President and General Manager, Alascom, to Don Schroer, Chairman, APUC, dated July 22, 1993. Finally, we note that the recent letter from the APUC Chairman, concerning the Commission's consideration of the Joint Board's recommendations, represents under Alaskan regulations, 0 Mr. Shroer's position, not that of the APUC. *Ex Parte* Letter from Mr. Schroer to Mr. Reed Hundt, dated May 10, 1994; Alaska Stat. § 42.05.071; 3 Alaska Admin. Code 48.020(f). In any event, this letter was filed long after the Overland involvement of which Alascom complains.

[69] *Id. See also Final Recommended Decision*, FCC 93J-2 at para. 166 and n.200.

45. Likewise, Alascom's analysis of the relevant law is faulty when it asserts that the use of Overland's services was impermissible because the FCC itself lacks authority to hire the consultant. In fact, a number of statutory provisions grant the Commission explicit authority for such purposes. Indeed, Section 410(b) of the Communications Act permits the FCC to accept services from a state commission.47 U.S.C. 410(b). Likewise, Section 3109 of Title 5 of the U.S. Code (which is incorrectly cited by Alascom for the opposite proposition) often is used by the Commission to hire experts and consultants. Moreover, the Office of Personnel Management guidelines construing Section 3109 allow the Commission to accept such services, with or without payment.[70] Thus, we reject Alascom's argument that the use of Overland's services was impermissible.

46. Finally, we conclude that there was no harm to the Alaska public as a result of the July 1, 1993 public hearing in Anchorage. As stated in the *Final Recommended Decision,* it is not apparent that the FCC rule regarding notice for public hearings applies to this situation since it was a Joint Board, rather than Commission, meeting. But, even if the rule is applicable, it is hard to see how anyone was injured. Reply comments to the hearing were accepted for almost two weeks after the meeting, and *ex parte* presentations were permitted thereafter. Indeed, Alascom acknowledges that this opportunity to file comments elicited 39 submissions from the Alaska public.[71] Moreover, this proceeding has been ongoing for more than eight years, with ample opportunity for public comment at every stage. It appears that any person with an interest in the Alaska telephone market would have had more than adequate notice and the occasion to present his or her views on the subject long before the *Final Recommended Decision* was adopted by the Joint Board.

47. Accordingly, for the reasons stated above, we reject Alascom's substantive and procedural arguments.

VI. ORDERING CLAUSES

48. Accordingly, pursuant to the authority contained in Sections 1, 4(i)-(j), 201-203, 214, and 220 of the Communications Act of 1934 As Amended, IT IS ORDERED THAT AT&T and Alascom must comply with the recommendations of the Alaska Joint Board in the *Final Recommended Decision,* which is incorporated herein by reference and clarified and modified in this Order.

49. IT IS FURTHER ORDERED that the JSA IS TERMINATED effective January 1, 1996.

50. IT IS FURTHER ORDERED that AT&T MUST FILE its Section 214 application consistent with the requirements of this Order no later than March 1, 1995.[72]

51. IT IS FURTHER ORDERED that the implementation of the revised market structure transition period begins July 1, 1994 and terminates as of June 30, 1998. The first phase will begin on July 1, 1994 and the second phase will begin on January 1, 1996.

52. IT IS FURTHER ORDERED that AT&T MUST FUND a reduction in Alascom's plant balances by a transition payment to Alascom of $150 million, in two installments ($75 million on July 1, 1994; and $75 million upon termination of the JSA).

53. IT IS FURTHER ORDERED that AT&T and Alascom SHALL FILE within 60 days of the effective date of the this order, requests with the United States Internal Revenue Service ("IRS") and with the State of Alaska for expedited rulings on whether the transition payment is, in whole or in part, taxable income.[73]

54. IT IS FURTHER ORDERED that Alascom MUST PROVIDE on July 1, 1994, account balances for gross investment, depreciation reserve, and net investment, as of March 30, 1994. Alascom MUST PROVIDE the same information, as of September 30, 1995.[74]

55. IT IS FURTHER ORDERED that the transition payment SHALL BE applied by Alascom exclusively to offset certain designated plant account balances consistent with the *Final Recommended Decision* and this order. Alascom MUST FILE with the Commission detailed proposals for its treatment of each of the two installments of the transition payment by July 1, 1994 and January 1, 1996, respectively.[75]

56. IT IS FURTHER ORDERED that AT&T MUST PURCHASE a fixed dollar amount of common carrier services from Alascom for each six month period of the second phase of the transition period according to the methodology adopted in the *Final Recommended Decision* and modified in this order.[76]

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[70] Federal Personnel Manual, Chapter 304.

[71] It is well settled that the Commission is not required to respond to, or to address, all pleadings. The fact that the Joint Board may not have explicitly referred to the Alaska public's reply comments in the *Final Recommended Decision* has no bearing on the sufficiency of notice before the hearing. In any event, in reaching our decision herein, we have considered the entire record.

[72] The *Final Recommended Decision* did not establish a date for AT&T to file a Section 214 application to serve Alaska. In this order we establish a date to ensure that AT&T is prepared to serve Alaska consistent with the requirements and time schedule of the *Final Recommended Decision* as modified in this order. Because we require in this order that AT&T file a Section 214 application consistent with the requirements of the *Final Recommended Decision* as clarified and modified herein, we reject Alascom's arguments regarding the effect of AT&T's withdrawal of its earlier filed Section 214 application to serve Alaska. *See* Response of Alascom, January 12, 1994.

[73] We delegate to the Chief, Common Carrier Bureau the authority to modify the AT&T transition payment to reflect the IRS and State of Alaska tax rulings as recommended in the *Final Recommended Decision,* FCC 93J-2, at para. 128, n.170.

[74] The *Final Recommended Decision* did not establish a filing date for this information. We conclude that this information is required on the same dates as the installments paid by AT&T to Alascom so that Commission staff can review the effect of the installments on Alascom's plant accounts.

[75] We delegate to the Chief, Common Carrier Bureau the authority to review and dispose of Alascom's detailed proposal for the treatment of the transition payment to verify that the $150 million transition payment is applied in accordance with this order. We require that Alascom file its proposals for treatment of the installments on the dates scheduled for payment by AT&T of the two installments so that Commission staff can review the proposals in a timely fashion.

[76] We delegate to the Chief, Common Carrier Bureau authority to decide issues arising with respect to the calculation of the fixed dollar amount of Alascom services AT&T must purchase for each six month period of the second phase of the transition period.

57. IT IS FURTHER ORDERED THAT no later than September 1, 1995, AT&T and Alascom may propose jointly an alternative method for calculating the fixed dollar amount of Alascom's Services AT&T must purchase for the provision of interstate MTS during the second phase of the transition period.[77]

58. IT IS FURTHER ORDERED that Alascom MUST FILE a Cost Allocation Plan, including the categorization and allocation methodology, within three months of the release of this Order.[78]

59. IT IS FURTHER ORDERED that ALASCOM MUST FILE common carrier service tariffs for switching and transport for the Bush and non-Bush areas of Alaska and cost support data no later than September 1, 1995 with a scheduled effective date of January 1, 1996.

60. IT IS FURTHER ORDERED that AT&T WILL TREAT the cost increase associated with the $150 million payment to Alascom and the cost decrease related to the cancellation of the JSA as exogenous costs under our price caps rules.

61. IT IS FURTHER ORDERED that the Alascom Application for Review filed November 29, 1993 IS DISMISSED as an improper filing under Section 1.115 of the Commission's rules.

62. IT IS FURTHER ORDERED that the AT&T Petition for a Lawful Interim Division of Charges, filed November 5, 1987, is dismissed as moot.

63. IT IS FURTHER ORDERED that the GCI Petition, filed January 29, 1992, is dismissed as moot.

64. IT IS FURTHER ORDERED that this order is effective thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[77] A deadline was not established in the *Final Recommended Decision* for AT&T and Alascom to propose an alternative method for calculating AT&T's fixed dollar purchase obligation during the second phase of the transition period. *Final Recommended Decision*, FCC 93J-2, para. 141. We establish a date to provide sufficient time to evaluate any AT&T and Alascom proposal. We delegate to the Chief, Common Carrier Bureau authority to review and dispose of the proposal.

[78] We delegate to the Chief, Common Carrier Bureau authority to review and dispose of Alascom's Cost Allocation Plan submission and to require any subsequent revision(s) based on the results of analysis and consideration of public comment, if any.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

United Broadcasting Corporation d/b/a Telemiami v. TCI TKR of South Dade, Inc.	CSC-366

ORDER

Adopted: June 10, 1994; Released: June 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we grant an emergency petition filed by United Broadcasting Corporation, d/b/a Telemiami ("Telemiami") requesting temporary waiver of Section 76.975(h) of the Commission's rules to permit Telemiami to continue to pay to TCI TKR of South Dade, Inc. ("TCI") its current leased access charges pending resolution of a separate petition for special relief filed by Telemiami.[1] We grant the relief requested for 90 days.

II. BACKGROUND

2. Section 612 of the Communications Act requires a cable operator to designate channel capacity for commercial use by persons unaffiliated with the operator. Section 612 also requires that the Commission determine the maximum reasonable rates that a cable operator may impose for leased commercial access.[2] The cable operator must establish the price, terms, and conditions of commercial use consistent with the rules established by the Commission.[3]

3. Section 612 also requires the Commission to establish procedures for the expedited resolution of disputes concerning rates or carriage on leased access channels.[4] In establishing its rules, the Commission provided that, during the pendency of such a dispute, a party seeking to lease channel capacity for commercial purposes shall comply with the rates, terms and conditions prescribed by the cable operator, subject to refund or other appropriate remedy.[5]

III. CONTENTIONS

4. Telemiami states that it offers advertiser-supported commercial 24-hour variety leased access programming over the TCI system, 90% of which is in Spanish and the rest in Portuguese, and that it has done so for ten years. Telemiami further states that it entered into its original five year agreement for commercial leased access with TCI in 1988, under which it paid $3,500 per month, and that upon expiration of the agreement in mid-1993 Telemiami started paying TCI on a month-to-month basis. Telemiami states that in February 1994, TCI proposed new leased access rates under which Telemiami's monthly payments would be $26,341, and that it was subsequently informed by TCI that it would no longer carry Telemiami unless Telemiami agreed to pay TCI's new rate and accept its other contract terms by May 10, 1994. Telemiami states that on May 10, 1994, it made a monthly payment of $26,341, stating that the payment was under protest pending resolution of its pending complaint. Telemiami asserts that it cannot afford to make even one more payment of $26,341 to TCI, because the monthly payments are 60% higher than Telemiami's entire monthly revenues. Telemiami argues that if the Commission does not waive Section 76.975(h), Telemiami will go off the air at the end of June, not only on TCI's South Dade system, but on all of the systems that carry Telemiami.[6] Telemiami states that preserving Spanish-language leased access programming in the Miami area is good cause for a waiver.

5. In opposition to the emergency petition, TCI states that its proposed rates fully comply with the Commission's leased access rules, that it is irrelevant whether Telemiami can afford to pay the leased access charge, and that, in fact, Telemiami has submitted no evidence that it is unable to raise funds to pay the leased access charge.[7] TCI further alleges that a waiver will not enhance competition, but might exclude other leased access programmers since other leased access Spanish language programmers are available and have ordered leased access service under its new rates.[8] TCI states that a waiver would compel TCI to retain a programmer, without adequate compensation, that is not offering a viable program service.

IV. DISCUSSION

6. We believe that the Telemiami petition should be resolved in a way that fairly balances the interests of TCI and Telemiami pending resolution of the underlying complaint concerning TCI's proposed leased access rates. We also believe that Telemiami's emergency petition should be resolved in light of the statutory purpose of leased commercial access. The 1992 Cable Act provides that the purpose of leased commercial access is to promote competition in the delivery of diverse sources of video programming

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[1] Section 76.975(h) provides that, during the pendency of a dispute, a party seeking to lease channel capacity for commercial purposes shall comply with the rates, terms, and conditions prescribed by the cable operator, subject to refund or other appropriate remedy. On April 8, 1994, Telemiami filed a petition for special relief against TCI (the "complaint") alleging that new leased access rates proposed by TCI violate the Commission's leased access rules. The complaint is pending.

[2] 47 U.S.C. § 532(c)(4)(A)(i); *see also* 47 C.F.R. § 76.970.

[3] 47 U.S.C. § 532(c)(1).

[4] 47 U.S.C. § 532(c)(4)(A)(iii).

[5] 47 C.F.R. § 76.975(h). *See also Report and Order*, MM Docket No. 92-266 (*"Rate Order"*), FCC 93-177, 8 FCC Rcd 5631 (1993). We note that petitions for reconsideration of the leased access provisions of the Commission's rules are pending.

[6] Telemiami has also filed a leased access complaint against Rifkin/Narrangansett South Florida CATV Limited Partnership, d/b/a Gold Coast Cablevision.

[7] TCI filed an answer to the emergency petition on June 2, 1994.

[8] Three programmers have signed TCI's standard leased access contract, and two of these have provided checks for the first month's service. TCI states it is also in negotiations with three other leased access programmers.

and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.[9]

7. Telemiami has provided its service in the Miami area for approximately ten years. Implementation of TCI's proposed rates raises a substantial possibility of termination of Telemiami programming service on a temporary or permanent basis.[10] Thus, granting the temporary waiver could prevent irreparable injury to Telemiami, as well as preventing loss of this programming service to viewers. In addition, it has not been shown that TCI will not be able to provide service to Telemiami as well as other leased access providers during the period of our waiver under the statutory leased access set aside requirements.[11] Nor is it alleged that other leased access programmers would be irreparably injured by granting the temporary waiver.[12] Further, TCI has not shown that the rate voluntarily agreed to by it and Telemiami prior to adoption of our leased access rate rules is an unreasonable charge pending resolution of the underlying Telemiami complaint.[13] Accordingly, we conclude that permitting Telemiami to continue paying its current rates as requested in its emergency petition will most fairly balance the interests of TCI and Telemiami.[14]

8. As stated, implementation of TCI's proposed rates raises a substantial possibility of termination of Telemiami's programming service on a temporary or permanent basis. Thus, granting the waiver request could assure continued provision of Telemiami's service pending resolution of Telemiami's leased access complaint. While TCI asserts that other programmers are available to purchase leased access from it at its proposed rates, we believe that it would better achieve the statutory purpose of assuring competition and a diversity of programming to preserve continued provision of Telemiami's longstanding service on a temporary basis. Accordingly, we further conclude that it would be most consistent with the statutory purposes of leased commercial access to permit Telemiami to continue paying its current monthly leased access charge pending resolution of its underlying complaint.

9. We will therefore grant the Telemiami emergency petition. We emphasize that this will require that TCI provide leased access service to Telemiami only pending resolution of the underlying complaint. We intend to resolve that complaint within approximately ninety days.

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. § 532, that the emergency petition of United Broadcasting Corporation, d/b/a Telemiami, for waiver of Section 76.975(h) of the Commission's rules IS GRANTED.

11. IT IS FURTHER ORDERED, pursuant to 47 U.S.C. § 532, that the permitted charge for leased access provided to Telemiami on TCI TKR of South Dade, Inc.'s system SHALL BE $3,500 per month, pending resolution of the underlying petition for special relief.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] Section 612(a) of the Communications Act of 1934, as amended; 47 U.S.C. § 532(a).

[10] Although Telemiami has not provided a complete financial showing, it has stated, supported by affidavit, that the proposed rate increases substantially exceed its total monthly revenues. This is a sufficient showing to raise a substantial question that implementation of TCI's proposed rates could cause termination of Telemiami's service on a temporary or permanent basis.

[11] Section 612 of the Communications Act requires a cable operator to designate channel capacity for commercial use by persons unaffiliated with the operator. An operator with 36 to 54 activated channels must designate ten percent of such channels which are not otherwise required for use by Federal law or regulation.47 U.S.C. § 532(b)(1)(A). TCI has 52 activated channels on its South Dade system. There are approximately 13 broadcast stations that are eligible to request mandatory carriage on the system pursuant to Commission rules. *See* 47 C.F.R. § 76.56. Therefore, at a minimum, TCI must set aside four channels for leased access users.

[12] *Id.*

[13] In adopting its leased access rules, the Commission stated that its rules would need refinement both through the rule making process and on a case-by-case basis. The Commission further stated that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved--whether the lease is for a pay channel, an advertiser supported channel intended for wide distribution, a channel for a narrow commercial purpose not relevant to the wide body of cable subscribers, or for a single program or series of programs. *Rate Order* at 5936.

[14] TCI has also claimed that granting the Telemiami petition will violate the First Amendment. Requiring TCI to charge its current rates on a temporary basis for provision of leased access to Telemiami is an exercise of our authority under Section 612 to determine maximum leased commercial access rates. The statutory requirement that operators provide carriage to leased access programmers at prescribed rates does not violate the First Amendment. Thus, we do not believe that setting maximum reasonable rates in this instance on a temporary basis, pursuant to Section 612, violates the First Amendment, notwithstanding that this will require TCI to continue to carry Telemiami's programming service at that rate during the period of our waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 13, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FOR RULEMAKING AND PETITION FOR RELIEF IN SECTION 214 VIDEO DIALTONE APPLICATION PROCESS

On May 23, 1994, the Center for Media Education, Consumer Federation of America, the Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People, and the National Council of La Raza ("Petitioners") filed a petition for rulemaking and a petition for relief.

In the petition for rulemaking, the Petitioners request that the Commission expeditiously initiate a rulemaking proceeding "to adapt the Section 214 application process for the better resolution of issues which have arisen in the context of applications to construct video dialtone facilities." The Petitioners state that the Commission currently relies on the Section 214 application as the method for handling unresolved video dialtone issues, but that Section 214 does not provide the public and video dialtone providers with guidelines for fair deployment. Specifically, the Petitioners assert that pending video dialtone proposals reveal an unacceptable pattern of "redlining" of minority or low income neighborhoods.

In order to address such issues, the Petitioners request that the Commission amend Section 214 to include an explicit and enforceable anti-redlining provision. The Petitioners also request that the 214 application process be opened up to include significant public participation. Specifically, the Petitioners argue that telephone companies should be required, at each phase of deployment, to make video dialtone service available to a proportionate number of lower income and minority customers. The Petitioners argue that the Commission should require that Section 214 applications include the relevant census tract data, such as race, ethnicity, and income statistics for each exchange (NXX) service. The Petitioners also argue that telephone companies should be required to give local public notice and to hold a public hearing to disclose the specifics of their video dialtone plans.

In the petition for relief, the Petitioners again allege that there are indications of "electronic redlining" in the construction applications of several Regional Bell Operating Companies (RBOCs). The Petitioners state that the RBOCs propose to bypass many lower income and/or minority communities in their initial deployment of video dialtone service. The Petitioners argue that this is a discriminatory practice inconsistent with the goal of universal service as established in the Communications Act.

To immediately address redlining issues, the Petitioners request that the Commission: (1) issue a policy statement announcing its commitment to the goal of universal video dialtone service, and to nondiscriminatory deployment at each phase of construction; (2) issue an interpretative rule clarifying that applicants seeking to construct and operate video dialtone facilities are already required to adhere to the objectives of universal service and the avoidance of discrimination on the basis of income level, race, or ethnicity; and (3) adopt a procedural rule instructing its staff to identify and bring to its attention applications that appear to violate these objectives, and remand these applications so that the telephone common carriers have the opportunity to conform them to the existing objectives.

Interested parties should file comments on these petitions by **June 28, 1994**, and reply comments by **July 6, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petitions can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Operating Companies' — Transmittal No. 7

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: June 13, 1994; Released: June 13, 1994

By the Deputy Chief, Policy, Common Carrier Bureau

1. On March 31, 1994 the Bell Operating Companies: the Ameritech Operating Companies, the Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., Nevada Bell, the NYNEX Telephone Companies, Pacific Bell, Southwestern Bell Telephone Company and US West, filed Transmittal No. 7, which modified rates and charges to reflect more current demand and cost forecast data. Specifically, the Bell Operating Companies changed their cost and revenue assumptions to reflect the impact of significantly higher demand than had been anticipated. In addition, they propose to add investment and expenses to reflect the acceleration of investment in additional storage and processing capability necessitated by demand for 800 number activation that exceeded original projections. Among other things, the transmittal reduces the Customer Record Administration charge and changes other rates, including an increase in the charge for Resp Org reports.[1]

2. The Bureau issued the *800 Data Base Access Tariff Order*[2] on April 28, 1993, which, among other things, suspended the subject transmittals for one day, imposed accounting orders and initiated investigations of the local exchange carriers' (LECs) database query tariffs and the Bell Operating Companies' Service Management System/800 Tariff. The captioned transmittal raises the same issues as those transmittals subject to the investigation initiated in the *800 Data Base Access Tariff Order*. Therefore, this transmittal will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that the Bell Operating Companies' Tariff F.C.C. No. 1, Transmittal No. 7, IS SUBJECT to the investigation instituted in CC Docket No. 93-129.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Bell Operating Companies SHALL FILE tariff revisions reflecting this suspension no later than June 13, 1994. The Bell Operating Companies should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 4(1) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Bell Operating Companies shall keep accurate account of all amounts received pursuant to its new service management system rates, which are rate elements already subject to this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief, Policy
Common Carrier Bureau

[1] "Resp Org" is a an acronym for "responsible organization." A Resp Org is an entity that is authorized to acces the Service Management System database for 800 service in order to enter or change a customer record.

[2] *Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, 8 FCC Rcd 3242 (Com.CAr. Bur. 1993) (*800 Data Base Access Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 20, 1994

COMMENTS INVITED ON WASHINGTON PUBLIC SAFETY PLAN AMENDMENT

On November 15, 1991, the Commission accepted the Public Safety Plan for Washington (Region 43). On April 4, 1994, Region 43 submitted a proposed amendment to its plan that would reformat the Plan, add two yearly filing windows and further clarify the application review procedures. Because the proposed amendment is a major change to the Region 43 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **July 28, 1994** and reply comments on or before **August 12, 1994**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-270 Washington-Public Safety Region 43.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-269

In the Matter of

Amendment of Section 73.202(b), RM-8318
Table of Allotments,
FM Broadcast Stations.
(Denison and
Pilot Point, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 14, 1994; Released: June 28, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Davis Family Trust ("petitioner"), permittee of Station KTCY-FM, Channel 285C2, Denison, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7668 (1993), proposing the reallotment of Channel 285C2 from Denison to Pilot Point, Texas, and modification of Station KTCY-FM's construction permit to specify Pilot Point as the community of license. Petitioner filed untimely comments supporting the reallotment and a motion to accept late filed comments.[1] No other comments were received.

2. We believe the public interest would be served by reallotting Channel 285C2 from Denison to Pilot Point, Texas, and modifying Station KTCY-FM's construction permit to specify Channel 285C2 at Pilot Point. The reallotment will not remove the sole local transmission service from Denison, which is part of the Denison-Sherman Urbanized Area, as Stations KDSX-AM and KDSQ-FM are licensed to serve Denison.[2] Pilot Point (population 2,538),[3] which is not in an Urbanized Area,[4] will receive its first local FM transmission service. Our engineering analysis indicated that the reallotment will enable Station KTCY-FM, from its new proposed site, to upgrade its station and provide reception service to an additional 307,815 persons. The removal of Station KTCY-FM will create a reception service loss area that includes 3,836 persons, all of whom will continue to receive at least five full-time aural reception services.

3. Channel 285C2 can be allotted to Pilot Point in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.0 kilometers (9.9 miles) north to accommodate petitioner's desired site.[5] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station KTCY-FM to specify Pilot Point, Texas, as its community of license on Channel 285C2, in lieu of its use at Denison, Texas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 11, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Denison, Texas	–
Pilot Point, Texas	285C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Davis Family Trust for Station KTCY-FM, IS MODIFIED to specify operation on Channel 285C2 at Pilot Point, Texas, in lieu of Denison, Texas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Davis Family Trust, permittee of Station KTCY-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

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[1] Although untimely filed, we will consider petitioner's comments in light of the fact that acceptance of petitioner's expression of interest would not require the denial or dismissal of another timely filed proposal for use of the spectrum.

[2] We note that the Denison-Sherman Urbanized Area receives aural services from seven local commercial AM and FM stations. In addition KDSQ-FM and KDSX-AM are licensed to Denison-Sherman, Texas. We note that the *Notice* erroneously identified Denison, Texas, as Station KIKM-FM's community of license rather than Sherman, Texas.

[3] Population figures are from the 1990 U.S. Census.

[4] Pilot Point is approximately 38 kilometers (23.6 miles) south of the Denison-Sherman Urbanized Area and 32.2 kilometers (20 miles) to the Northeast of the Denton, TX, Urbanized Area.

[5] The coordinates for Channel 285C2 at Pilot Point are North Latitude 33-32-20 and West Longitude 96-57-15.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-271

In the Matter of

Amendment of Section 73.606(b) RM-8345
Table of Allotments,
TV Broadcast Stations.
(Walla Walla, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1994; Released: June 28, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Spectrum Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7670 (1993), proposing the substitution of VHF Channel 9+ for vacant UHF Channel 14- at Walla Walla, Washington, as that community's first local television broadcast service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Petitioner also filed reply comments urging the Commission to grant the substitution request since no other comments were received.

2. As indicated in the *Notice*, petitioner stated in support of its proposal that Channel 14- is fallow and is adjacent to land mobile communications which would cause interference that would be costly to eliminate and would cause disruption to both services. Petitioner also asserted that it would be in the public interest to have a viable VHF television station in Walla Walla than have UHF Channel 14- remain vacant due to the anticipated costs of operation and reduced service area.

3. We believe the public interest would be served by substituting Channel 9+ for vacant Channel 14- at Walla Walla, Washington, since it would provide the community with a wider service area. An engineering analysis has determined that Channel 9+ can be substituted at Walla Walla in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Since Walla Walla is located within 400 kilometers (250 miles) of the U.S.-Canadian border, Canadian concurrence has been received. Although the Commission has imposed a freeze on television allotments in certain areas, Walla Walla is not in one of the affected areas.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 11, 1994**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Walla Walla, Washington	9+

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 9+ at Walla Walla are North Latitude 46-04-12 and West Longitude 118-19-48.

[2] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 2 Fed. Reg. 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-99

In the Matter of

Amendment of Section 73.202(b),	RM-8202
Table of Allotments,	RM-8304
FM Broadcast Stations.	
(Ashland, Moberly,	
Monroe City, Rolla and	
Wheeling, Missouri)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1994; Released: June 28, 1994

By the Acting Chief, Allocations Branch:

1. In response to a petition filed by FM 105, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2745 (1993), seeking the substitution of Channel 288C2 for Channel 288C3 at Moberly, Missouri. Petitioner also requested modification of its license for Station KZZT(FM), Channel 288C3, to specify operation on Channel 288C2. Petitioner and Bick Broadcasting, Inc. ("Bick Broadcasting"), filed comments. Sobocomo Radio, Inc. ("Sobocomo") filed a counterproposal.[2] Petitioner and Sobocomo filed reply comments. Informal comments were filed by Town and Country Communications, Inc.[3]

2. Bick Broadcasting, licensee of Station KXKX, Knob Noster, Missouri, does not object to the proposed upgrade at Moberly provided the transmitter location for Channel 288C2, Moberly, provides full spacing to Station KXKX. Bick notes that although Station KXKX currently operates on Channel 289C3, it has been modified to operate on Channel 289C2. *See* 7 FCC Rcd 7283 (1992).

3. In reply comments, petitioner continues to support the allotment of Channel 288C2 at Moberly. Petitioner contends that Bick Broadcasting's concerns are premature. No short spacing currently exists between proposed Channel 288C2 at Moberly and Channel 289C2 at Knob Noser and that the *Notice* expressly stated that protection would be afforded to Station KXKX at Knob Noster. Petitioner notes that it will file a modification application for Channel 288C2 in full compliance with the Commission's spacing requirements.

4. We believe the public interest would be served by the substitution of Channel 288C2 for Channel 288C3 at Moberly, Missouri, since it would provide expanded FM service to the community. The substitution can be made in compliance with theCommission's spacing requirements at petitioner's specified site.[4] In addition, we have authorized a modification of the license for Station KZZT(FM), Moberly, Missouri, to specify operation on Channel 288C2 in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 11, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Moberly, Missouri	247C3, 284C, 288C2

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KZZT(FM), Channel 288C3, Moberly, Missouri, IS MODIFIED to specify operation on Channel 288C2, subject to the following conditions:

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[1] The communities of Ashland, Rolla, Monroe City and Wheeling, Missouri, have been added to the caption.

[2] Public notice of the counterproposal was given on August 2, 1993 (RM-8304), Report No. 1957. Sobocomo, permittee of FM Channel 291C2, Station KBXR, Ashland, Missouri, counterproposed the substitution of Channel 291C1 for Channel 291C2 at Ashland. To accommodate the upgrade at Ashland, Sobocomo also requested the substitution of Channel 276C3 for Channel 292A at Rolla, Missouri, substitution of Channel 298A for Channel 292A at Monroe City, Missouri, and the change of reference coordinates for Channel 290A at Wheeling, Missouri. The Public Notice also requested that competing expressions of interest in the use of Channel 276C3 at Rolla, Missouri, be submitted within 15 days of the date of the public notice. Sobocomo filed a similar counterproposal in MM Docket 91-181 which was denied in the *Report and Order* in that proceeding. *See* 8 FCC Rcd 1799 (1993). Sobocomo filed a petition for reconsideration of that decision which was put on public notice on May 27, 1993 (Report No. 1943). On May 2, 1994, a *Memorandum Opinion and Order* was adopted granting Sobocomo's request for substitution of Channel 291C1 for Channel 291C2 at Ashland, substitution of Channel 248A for Channel 292A at Rolla, Missouri, and substitution of Channel 298A for Channel 292A at Monroe City, Missouri. With the resolution of Sobocomo's petition for reconsideration in MM Docket 91-181, the counterproposal filed by Sobocomo in this proceeding is moot. Therefore, no further consideration will be given to Sobocomo's counterproposal. Accordingly, comments filed in response to the counterproposal need not be considered.

[3] The comments of Town and Country Communications, Inc. were not served on the petitioner, in violation of Section 1.420(c) of the Commission's Rules, and therefore they have not been accepted for consideration.

[4] The coordinates for Channel 288C2 at Moberly are 39-25-45 and 92-22-49. Although the *Notice* indicated that grant of a license for Channel 288C2 at Moberly, at the above site, could be withheld because of a short spacing to Channel 288A, Station KXKX, Knob Noster, Missouri, Station KXKX is now licensed on Channel 289C3 at a site that is fully spaced to Channel 288C2, Moberly. Further, Station KXKX has a construction permit for Channel 289C2 that also is fully spaced to Channel 288C2 at Moberly.

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the counterproposal filed by Sobocomo Radio, Inc. (RM-8304) IS DISMISSED.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, FM 105, Inc., licensee of Station KZZT(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-63

In the Matter of

Amendment of Section 73.202(b), RM-8450
Table of Allotments,
FM Broadcast Stations.
(Rocky Mount and Bassett, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 14, 1994; Released: June 28, 1994

Comment Date: August 19, 1994
Reply Comment Date: September 3, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WNLB Radio, Inc. ("petitioner"), licensee of Station WZBB-FM, Channel 260A, Rocky Mount, Virginia, proposing the substitution of Channel 260C3 for Channel 260A, the reallotment of Channel 260C3 from Rocky Mount to Bassett, Virginia, and the modification of petitioner's license to specify Bassett as Station WZBB-FM's community of license. Petitioner states it will apply for Channel 260C3 at Bassett, if allotted.

2. Petitioner seeks modification of Station WZBB-FM's license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the licensee of an existing station a higher class channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Petitioner contends that the adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local transmission service to Bassett while Rocky Mount would retain local aural transmission from Stations WNLB-AM and WYTI-AM. In support if its request, petitioner states WZBB-FM is precluded from upgrading its facility at Rocky Mount and adoption of its proposal would result in service to 80.2% more area and 100.2% more population. Moreover, it asserts its proposal would not result in the creation of any underserved area. Petitioner also states that Bassett is a census designated place ("CDP") with a 1990 U.S. Census population of 1,579 persons, noting until recently Bassett was the city of license for Station WODY-AM, thereby demonstrating that Bassett is a licensable community within the meaning of the Commission's allotment criteria, citing, *e.g., North Naples, Florida*, 41 RR2d 1549 (1977). Petitioner further states that Bassett has a U.S. post office, one high school, a rescue squad and volunteer fire department. Bassett has numerous community and civil organizations, including the Bassett Community Center, Toastmaster Club, Jaycees, Moose Lodge and Ruritan Lodge. There are churches, and some businesses which identify themselves with the community of Bassett. Petitioner claims that the resulting service improvement will enable WZBB-FM to serve a population of 164,933 persons, in comparison to its present service to 82,192 persons, and will overcome the existing preclusion to improved service which WZBB-FM now faces.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. According to petitioner, Bassett has no local aural transmission service licensed to the community while Rocky Mount has two AM stations and one FM station. However, our review indicates that Bassett is served by Station WCBX-AM, thereby petitioner's claim of providing a first local aural transmission service to Bassett is in fact a proposal for an additional local service to the community. While we tentatively acknowledge petitioner's claim that it proposal might provide service to a larger population, we must take into account the fact that an existing service will be deleted from a community. With respect to evaluating proposals to change community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another." *See Community of License MO&O*, 5 FCC Rcd at 7097 (1990); *see also, Report and Order (Eatonton and Sandy Springs, Georgia; Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* Since we are concerned with the loss of service to the community of Rocky Mount, we request petitioner to submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal. In addition, we request that the petitioner provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Channel 260C3 is reallotted to Bassett. The study should also indicate the number of reception services which are now available within the gains and loss areas.

4. We believe the public interest would be served by proposing the substitution of Channel 260C3 for Channel 260A and the reallotment of Channel 260C3 from Rocky Mount to Bassett since it could provide Bassett with a second local aural transmission service. Channel 260C3 can be allotted to Bassett in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.0 kilometers (6.2 miles) northwest to accommodate petitioner's desired site.[1]

5. In light of the above, we shall propose to modify Station WZBB-FM as requested, to specify Bassett, Virginia, as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules,

[1] The coordinates for Channel 260C3 at Bassett are North Latitude 36-48-47 and West Longitude 80-04-41. We recognize that the allotment of Channel 260C3 to Bassett conflicts with the presently licensed operation of Station WRFX-FM, Channel 259C, Kannapolis, North Carolina. However, on May 16, 1994, Station WRFX-FM's application for license to cover its construction permit (BPH-920903IL) was granted, thereby eliminating any conflict with this proceeding. The licensee of Station WRFX-FM will be served with a copy of this *Notice*.

we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at Rocky Mount.

6. The Commission believes it would be in the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Rocky Mount, Virginia	260A	---
Bassett, Virginia	---	260C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **August 19, 1994**, and reply comments on or before **September 3, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for petitioner)

9. *IT IS ORDERED,* That the Secretary of the Commission *SHALL SEND* a copy of this *Notice* by Certified Mail, Return Receipt Requested, to: Pyramid Communications-Charlotte FM License Corporation, 245 Park Avenue, 40th Floor, New York, New York 10167 (Licensee of Station WRFX-FM).

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-62

In the Matter of

Amendment of Section 73.202(b), RM-8444
Table of Allotments,
FM Broadcast Stations.
(Kasilof, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 14, 1994; Released: June 28, 1994

Comment Date: August 19, 1994
Reply Comment Date: September 3, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of William Glynn ("petitioner") requesting the allotment of FM Channel 229A to Kasilof, Alaska, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 229A if allotted to Kasilof, as requested.

Technical Statement

2. A staff engineering review of the proposal reveals that Channel 229A can be allotted to Kasilof consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction at coordinates 60-20-15 and 151-16-20.

3. We believe the public interest would be served by proposing the allotment of Channel 229A to Kasilof, Alaska, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Kasilof, Alaska, as follows:

	Channel No.	
City	Present	Proposed
Kasilof, Alaska	–	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 19, 1994**, and reply comments on or before **September 3, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Benjamin Perez, Esq.
Abacus Communications Company
1801 Columbia Road, N.W.
Suite 101
Washington, D.C. 20009-2031

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-64

In the Matter of

Amendment of Section 73.202(b), RM-8453
Table of Allotments,
FM Broadcast Stations.
(Ider, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 14, 1994; Released: June 28, 1994

Comment Date: August 19, 1994
Reply Comment Date: September 3, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Deborah M. Thompson ("petitioner") requesting the allotment of FM Channel 254A to Ider, Alabama, as that community's first local aural transmission service. Petitioner stated her intention to apply for Channel 254A if allotted to Ider, as requested.

Technical Statement

2. A staff engineering review of the proposal reveals that Channel 254A can be allotted to Ider consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 13.0 kilometers (8.1 miles) northeast of the community at coordinates 34-48-43 and 85-36-07. The site restriction is required to avoid a short-spacing to the licensed site of Station WSB-FM, Channel 253C, Atlanta, Georgia, at coordinates 33-45-35 and 84-20-07, as well as to the licensed site of Station WAHR(FM), Channel 256C, Huntsville, Alabama, at coordinates 34-47-53 and 86-38-24.

3. We believe the public interest would be served by proposing the allotment of Channel 254A to Ider, Alabama, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Ider, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Ider, Alabama	–	254A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 19, 1994**, and reply comments on or before **September 3, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and her consultant, as follows:

Deborah M. Thompson
Route 5, Box 881
Scottsboro, AL 35768

and

Kirk A. Tollett
Commsouth Media
Associates
4001 Highway 78 East
Jasper, AL 35501
(Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-60

In the Matter of

Amendment of Section 73.202(b), RM-8455
Table of Allotments,
FM Broadcast Stations.
(Duncan, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 9, 1994; Released: June 28, 1994

Comment Date: August 19, 1994
Reply Comment Date: September 3, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of Duncan Community Radio ("petitioner") requesting the allotment of FM Channel 264A to Duncan, Arizona, as that community's first local aural broadcast service. Petitioner advises that it, or an applicant affiliated therewith, will apply for Channel 264A if it is allotted to Duncan.

2. We believe the public interest would be served by proposing the allotment of Channel 264A to Duncan since it could provide a first local aural broadcast service to the community.

Technical Statement

3. Channel 264A can be allotted to Duncan in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without a site restriction, at coordinates 32-43-12 and 109-06-12. Additionally, as Duncan is located within 320 kilometers (199 miles) of the United States Mexican border, the Commission must obtain the concurrence of the Mexican government in the proposal.

4. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Duncan, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Duncan, Arizona	--	264A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 19, 1994**, and reply comments on or before **September 3, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jeffrey Southmayd, Esq.
Southmayd & Miller
1220 - 19th Street, N.W.
Suite 400
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for	**CC Docket No. 90-623**
Removal of the	**CC Docket No. 88-2, Phase I**
Structural Separation	
Requirement and Waiver of	
Certain State Tariffing	
Requirements	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: June 29, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. In the *BOC Safeguards Order*, the Commission stated that the structural separation requirement for the provision of enhanced services by the Bell Operating Companies (BOCs) would be removed for each BOC when it filed a notice informing the Commission that it is technically prepared to offer its Open Network Architecture (ONA) services, it has effective federal tariffs for each of its initial interstate ONA services, and it has filed state tariffs for each of its initial intrastate ONA services.[1] In response to the notices and petitions for removal of the structural separation requirement filed by each of the BOCs, the Common Carrier Bureau granted structural relief to each of the BOCs.[2] The Newspaper Association of America (NAA) filed applications for review of six of the Bureau's orders.[3] We deny each of NAA's applications for review and affirm the Bureau's decisions.

II. APPLICATIONS FOR REVIEW

2. In each of its applications, NAA presents identical arguments in support of its claim that the BOCs should not have been granted structural relief.[4] First, NAA argues that the Bureau's removal of the structural separation requirement conflicts with established policy or involves application of a policy that should be overturned. Second, NAA argues that the Bureau's decisions were based on policy that is under appellate review and that structural relief should be deferred pending such review.

3. NAA states that the Commission has previously noted that a "major goal" of the *Computer III* and *ONA* proceedings is to increase opportunities for enhanced service providers (ESPs) to use the BOCs' regulated services in the provision of enhanced services and in the development of new offerings, all to the benefit of consumers. NAA argues that the Bureau failed to consider whether the BOCs' petitions would further these goals or how structural relief would affect competition in enhanced services. NAA argues that the record in response to the BOCs' petitions demonstrated that structural relief would increase both the incentive and the opportunity for the BOCs to engage in

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[1] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-523, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992). *See also* In the Matter of Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), CC Docket No. 88-2, Phase I, *Erratum*, 5 FCC Rcd 4045, *recon.*, 8 FCC Rcd 97 (1993) (*BOC ONA Amendment Reconsideration Order*), *pets. for review denied* , California v. FCC, No. 90-70336, slip op. (9th Cir. Sept. 23, 1993), 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order*), 8 FCC Rcd 2606 (1993), (*BOC ONA Second Further Amendment Order*), *pet. for review denied*, MCI Telecommunications Corp. v. FCC, No. 92-70189, slip op. (9th Cir. Sept. 23, 1993).

[2] *See* Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 3877 (1992) (*Bell Atlantic Order*); Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 7294 (1992) (*SWBT Order*); US West Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 3639 (1992) (*US West Order*); Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 4104 (1992) (*Ameritech Order*); New York Telephone Company and New England Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 8633 (1992) (*NYNEX Order*); Pacific Bell and Nevada Bell Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 3982 (1993) (*Pacific Order*); BellSouth Corporation Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 4864 (1993) (*BellSouth Order*).

[3] NAA Application for Review of *Bell Atlantic Order*, filed July 8, 1992 (NAA Bell Atlantic Application); NAA Application for Review of *US West Order*, filed July 9, 1992 (NAA US West Application); NAA Application for Review of *Ameritech Order*, filed July 15, 1992 (NAA Ameritech Application); NAA Application for Review of *SWBT Order*, filed December 2, 1992 (NAA SWBT Application); NAA Application for Review of *Pacific Order*, filed June 21, 1993 (NAA Pacific Application); NAA Application for Review of *BellSouth Order*, filed August 13, 1993 (NAA BellSouth Application). NAA did not seek review of the *NYNEX Order*.

[4] In its application for review of the *Bell Atlantic Order*, NAA raises an additional argument. NAA argues that the *Bell Atlantic Order* failed to acknowledge NAA's opposition to Bell Atlantic's petition for removal of the structural separation requirement. NAA contends that the Commission, therefore, has no assurance that the Bureau considered NAA's arguments that Bell Atlantic failed to tariff its Ultra Call Forward basic service element (BSE) in all jurisdictions and that structural relief should be deferred until appellate review of the underlying orders. NAA Bell Atlantic Application at 10.

anticompetitive behavior against other ESPs. It argues that the measures described by the BOCs in their petitions provide insufficient protection against such behavior.

4. NAA also challenges the Bureau's decisions in light of the pending appeal of the *BOC Safeguards Order*.[5] NAA argues that the Bureau's decisions risk prejudicial harm to competition in enhanced services if the Commission's underlying order is reversed or vacated by the court. NAA argues that if the Commission's order is vacated on appeal, the basis for the Bureau's action will be eliminated and the Commission would be required to order reimposition of structural separation of the BOCs' enhanced services operations.[6] NAA argues that structural relief should therefore be postponed pending the court's decision. NAA further argues that if we decline to defer action we should, at a minimum, require the BOCs to ensure that a structurally separate regime can be restored promptly upon the resolution of the proceedings.

5. MCI supports each of NAA's petitions.[7] MCI argues that since the BOCs filed their petitions, new developments have confirmed the inadequacy of ONA and the other safeguards specified in the *BOC Safeguards Order*. Specifically, MCI argues that the 1992 ONA plan amendments demonstrate the BOCs' limited progress in providing ONA services and applying new technologies to ONA. MCI also contends that the court in *California* v. *FCC* recognized that ONA, as implemented by the Commission, falls short of the ONA policies set forth in *Computer III* and thus cannot serve as an adequate predicate for structural relief.[8]

6. Each of the BOCs filed comments opposing the application pertaining to its specific petition for structural relief. Several of the BOCs argue that NAA and MCI raise issues that have been previously decided by the Commission and that both NAA and MCI are merely attempting to delay structural relief. The BOCs contend that NAA is improperly utilizing the application for review process as a procedural mechanism to reargue its dissatisfaction with our ONA policy.[9] Several BOCs also dispute MCI's claim that the BOCs are not implementing ONA as envisioned by the Commission. In addition, several BOCs dispute MCI's characterization of *California* v. *FCC*.[10]

7. All of the BOCs argue that the Bureau acted appropriately in granting the requests for structural relief. They state that the Bureau's delegated authority was limited to determining whether the BOCs met the Commission's criteria for removing the structural separation requirement.[11] They argue that the Bureau properly concluded that the BOCs had made the required showing.[12]

8. The BOCs also oppose NAA's request that structural relief be postponed until the court reviews the Commission's *Computer III* decisions. The BOCs argue that NAA's request is simply a motion for stay, which should have been filed by NAA prior to the BOCs' filings for structural relief.[13] In addition, Bell Atlantic and Pacific argue that NAA has failed to make the requisite showing to support such a stay. According to Bell Atlantic, absent such a showing there is no justification to deny the public new services for which they have waited since *Computer III* was decided.[14] SWBT adds that since NAA did not seek a stay, the Bureau was obligated to apply the *ONA* orders.[15] In its reply, NAA disputes the BOCs' argument that NAA is seeking a stay of the *ONA* orders.[16]

III. DISCUSSION

9. We deny NAA's applications for review of the BOC structural relief orders. We conclude that the Bureau acted properly and within the scope of its authority in granting structural relief to the BOCs. In the *BOC Safeguards Order*, we specifically set out the requirements for granting structural relief to the BOCs and delegated to the Common Carrier Bureau the authority to oversee the process of removing the structural separation requirement.[17] We concur with the Common Carrier Bureau's conclusions in the structural relief orders that each of the BOCs complied with the requirements of the *BOC Safeguards Order*.

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[5] *See People of the State of California, et al.* v. *FCC*, No. 92-70083 and consolidated cases (9th Cir.). NAA also cites the petitions for review of the *ONA* decisions that were under court review prior to NAA's applications. Since NAA filed its applications, however, the Court has denied the petitions for review of the *ONA* decisions. *People of the State of California et al.* v. *FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California* v. *FCC*).

[6] In addition, NAA argues that the Commission is investigating the ONA tariffs filed by the BOCs. NAA contends that if these tariffs are rejected by the Commission, the BOCs will not be in compliance with the federal tariffing requirement.

[7] A list of parties filing comments and replies is attached as Appendix A. On September 1, 1992, Ameritech filed its comments accompanied by a Motion to Accept Late Filing. No one opposed Ameritech's Motion, and we now grant it.

[8] *See ex parte* letter, October 7, 1993, to Mr. William Caton, Acting Secretary, FCC, from Frank W. Krogh, MCI.

[9] *See* Bell Atlantic Opposition at 1, Reply at 1; US West Opposition at 2-8, US West Reply at 2-5; Ameritech Reply at 3; Pacific Opposition at 1-3, Reply at 2; SWBT Reply at 7-8; and BellSouth Reply at 1-2. In addition, Bell Atlantic asserts that there is no merit to NAA's argument that the Bureau failed to address NAA's concerns regarding the tariffing of its Ultra Forward service. Bell Atlantic states that the Bureau order specifically acknowledged the minor delays with Ultra Forward tariffing and required tariffs to be filed as soon as possible. Bell Atlantic Opposition at 3.

[10] *See Ex Parte* Letter, November 5, 1993, to Mr. William, Caton, Acting secretary, FCC, from, JoAnn Bloom, Ameritech; Lawrence W. Katz, Bell Atlantic; M. Robert Sutherland, Bellsouth; Mary McDermott, New England Telephone & Telegraph Company James P. Tuthill, Pacific.

[11] Bell Atlantic Opposition at 1; US West Opposition at 7; Ameritech Reply at 3; Pacific Opposition at 2-3; SWBT Comments at 4-5; and BellSouth Opposition at 3.

[12] Bell Atlantic Reply Comments at 4; SWBT Reply Comments at 23; Ameritech Reply Comments at 2; US West Reply Comments at 6; and BellSouth Opposition at 3-4, Reply Comments at 1.

[13] Bell Atlantic Opposition at 2; US West Opposition at 6, n.12; Ameritech Reply at 3; BellSouth Opposition at 4; Pacific Opposition at 3; and SWBT Comments at 6-7 citing *Virginia Petroleum Job Association* v. *Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and *Washington Metropolitan Area, Etc.* v. *Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

[14] Bell Atlantic Reply Comments at 2

[15] SWBT Opposition at 7.

[16] NAA Reply Comments to Bell Atlantic Application at 5; NAA Reply Comments to Ameritech and US West Applications at 5; and NAA Reply Comments to SWBT Application at 4.

[17] *BOC Safeguards Order*, 6 FCC Rcd at 7624-5, n.212

10. We also find that the Bureau acted appropriately in declining to address the arguments raised by NAA and MCI regarding ONA policy and the criteria for structural relief.[18] These arguments, which address the merits of our *Computer III* policies, have been thoroughly discussed and rejected by the Commission in the *BOC Safeguards Order* and *ONA* orders. NAA should have raised these arguments in a petition for reconsideration of these orders, not in an application for review of the Bureau's implementation of Commission decisions.[19]

11. We also reject NAA's argument that we should defer structural relief pending appellate review of the *BOC Safeguards Order*.[20] We have found that our strengthened set of nonstructural safeguards, along with ONA, are an effective alternative to structural separation in guarding against anticompetitive conduct by the BOCs in the enhanced services market.[21] We have found, further, that structural separation requirements impose unnecessary costs that are inevitably borne by consumers. With structural relief the BOCs are permitted to realize fully the efficiencies from integrated operations and the potential to provide enhanced services to the public, especially to the consumer market. The enhanced services provided by the BOCs to consumers and businesses will stimulate commerce because of improved communications options. We do not wish to maintain unnecessary barriers that hamper the industry from responding to marketplace incentives that foster increasing use and advancement of the national's telecommunications assets.

12. Further, NAA has not shown that the BOCs later would be unable to comply with an unfavorable court decision once granted structural relief. Under the circumstances we are unwilling to deny the public the benefits of our *Computer III* policies pending this decision.[22] Nor, for the same reasons, will we require the BOCs to take special measures to ensure that they can restore a structurally separate regime in the event of an unfavorable court ruling.

13. Finally, we reject MCI's assertion that the court in *California* v. *FCC* has indicated that ONA, as implemented, is an inadequate predicate for structural relief. Contrary to MCI's claim, the court specifically declined to address that issue.[23]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that each of NAA's application for review of the Common Carrier Bureau's Notice and Petition for Removal of the Structural Separation Requirement and Request for Waiver of Certain State Tariffing requirements is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

NAA Application for Review of Bell Atlantic
NAA Application for Review of US West
NAA Application for Review of Ameritech
NAA Application for Review of SWBT
NAA Application for Review of Pacific
NAA Application for Review of BellSouth

MCI Comments on NAA Bell Atlantic Application
MCI Joint Comments on NAA US West and Ameritech Applications
MCI Comments on NAA SWBT Application
MCI Comments on NAA Pacific Application
MCI Comments on NAA BellSouth Application
MCI Reply Comments on NAA BellSouth Application

Bell Atlantic Reply Comments

US West Opposition
US West Reply Comments

Ameritech Late Filed Comment
Ameritech Reply Comments

SWBT Comments
SWBT Reply Comments

Pacific Opposition
Pacific Reply Comments

BellSouth Opposition
BellSouth Reply Comments

[18] In its orders, the Bureau correctly stated that the structural relief proceeding is not the proper forum for parties to reargue the merits of the Commission's decisions. Thus, the Bureau declined to address the arguments challenging our decision to lift the structural separation requirements, the role of state tariffs in the ONA process, and the pricing of interstate ONA services.

[19] There are several petitions for reconsideration of the *BOC Safeguards Order* pending before the Commission. These petitions, however, seek reconsideration of the Commission's Customer Proprietary Network Information (CPNI) rules and do not address the arguments raised in NAA's applications.

[20] We also reject NAA's arguments regarding the *Bell Atlantic Order*. Although the Bureau did not specifically identify NAA as the party raising the issue of tariffing Bell Atlantic's Ultra Forward service, the fact that the Bureau addressed this issue is sufficient assurance for us that it considered NAA's arguments. In its order, the Bureau required Bell Atlantic to file state tariffs for the service as soon as it is technically feasible. *See supra* n.9.

[21] *BOC Safeguards Order*, 6 FCC Rcd at 7623-4, para. 108.

[22] NAA's argument that we should postpone action until the ONA tariff investigations are complete is moot since the Commission had since terminated its investigation of these tariffs. *See* In the Matter of Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, FCC 93-532, released Dec. 15, 1993.

[23] *California* v. *FCC*, 4 F.3d at 1513.

NAA Reply Comments on Bell Atlantic Application
NAA Reply Comments on Ameritech and US West Applications
NAA Reply Comments on SWBT Application
NAA Reply Comments to BellSouth Opposition

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PowerSpectrum, Inc.
Waiver of Rule Sections 90.631(e),(f)

ORDER

Adopted: June 10, 1994; Released: June 13, 1994

By the Deputy Chief, Land Mobile & Microwave Division, Private Radio Bureau:

1. On May 31, 1994, Cleveland Mobile Radio, Inc. ("CMR") filed a Petition to Issue Show Cause Order ("CMR Petition") regarding the rule waivers granted by the Private Radio Bureau to PowerSpectrum, Inc. ("PSI") on June 25, 1993.[1] CMR requests that the Commission issue an Order requiring PSI to show cause why the waiver of the one-year construction period granted to PSI for its 900 MHz stations should not be withdrawn.

2. On June 9, 1994, PSI requested an extension of time to respond to the CMR Petition. In its extension request, PSI states that it has been engaged in discussions with CMR in an effort to settle any conflict between them. Because these discussions have not been successful to date, PSI seeks a 10-day extension of time to respond to the CMR Petition. We agree that the public interest would be served by granting the requested extension.

3. Accordingly, IT IS ORDERED, pursuant to Section 0.331 of the Commission's Rules, 47 CFR § 0.331, that the deadline for PSI to respond to the CMR Petition to Issue Show Cause Order is extended to June 20, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Edward Jacobs
Deputy Chief, Land Mobile & Microwave
Division, Private Radio Bureau

[1] *See* PowerSpectrum, Inc., 8 FCC Rcd 4452 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHEQUAMEGON TELEPHONE COOPERATIVE — AAD 93-160

Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1994; Released: June 29, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On November 17, 1993, Chequamegon Telephone Cooperative ("Chequamegon") filed a petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules.[1] This waiver would allow Chequamegon to change its study area boundaries as a result of its purchase of the Madeline Island Telephone Company ("Madeline"). We placed this petition on public notice on December 22, 1993.[2] We received comments in support of the request from the National Exchange Carrier Association, Inc. ("NECA") and the United States Telephone Association ("USTA") and reply comments from Chequamegon. No party opposed Chequamegon's waiver request. In response to a telephone inquiry, Chequamegon provided additional information concerning data that were attached to the Petition on March 1, 1994.[3] Chequamegon also submitted a copy of the Order of the Public Service Commission of Wisconsin ("PSCW"), which approved Chequamegon's purchase of Madeline with certain conditions.[4]

2. Chequamegon is a small, cooperatively owned and operated, local exchange carrier in rural northern Wisconsin serving approximately 7,700 lines. The Madeline study area consists of a single exchange serving approximately 430 lines on Madeline Island and on one of the Apostle Islands in Lake Superior. The Madeline exchange is 14 miles from the service area of Chequamegon.

3. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform their jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[5] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[6] There are three primary concerns in assessing study area boundary change petitions: first, that the change not adversely affect the Universal Service Fund ("USF") support program;[7] second, that the state commission(s) having regulatory authority have no objection to the change;[8] and finally, that there is strong public interest support for a waiver.

II. PETITION AND PLEADINGS

4. The petitioner states that the PSCW has expressed in its Order that Madeline has a history of poor service and obsolete facilities.[9] The PSCW states that Chequamegon's acquisition of control of Madeline would provide for the installation of capable, new owners committed to providing quality service in a remote area.[10] Furthermore, the petitioner states, in approving the acquisition of Madeline, the PSCW found that Chequamegon had adequate financial resources to provide Madeline with the basic services that subscribers in the rest of the state received.[11]

5. The petitioner contends that the USF support fund payments would decrease by $60,000 if the two study areas are merged.[12] The petitioner also states that inclusion of the Madeline operation in the Chequamegon study area would not have a substantial effect on the weighted Dial Equipment Minutes (DEM) factor[13] because the Madeline switched traffic volumes are a very small proportion of the Chequamegon switched traffic volumes.[14]

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[1] Chequamegon Telephone Cooperative Petition for Waiver of Study Area Definition of Part 36 Appendix-Glossary of the Commission's rules (Petition).

[2] *See* Public Notice, 8 FCC Rcd 8797 (Com. Car. Bur. 1993).

[3] Supporting information from Chequamegon that was received on March 1, 1994 as "Supplemental Data."

[4] Public Service Commission of Wisconsin *Findings of Fact, Conclusions of Law, Order and Certificate*, File Nos. 3260-TV-100, 3260-SB-100, 3260-TI-102 (March 9, 1993). ("PSCW Order")

[5] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation*).

[6] 47 C.F.R. Part 36, Appendix-Glossary.

[7] *See Joint Board Recommendation, 49 Fed. Reg. at 48337, para. 65.*

[8] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990). (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes.

[9] Petition at 2.

[10] PSCW Order at 23.

[11] Petition at 2.

[12] *Id.* at 3.

[13] The weighted DEM factor is used to separate local switching equipment costs between the state and interstate jurisdictions.

[14] *Id.* at 4.

6. Madeline is an average schedule company and the merger of the Madeline exchange into the operations of Chequamegon would convert the Madeline study area to cost-based interstate settlements.

III. DISCUSSION

7. The parties present a strong case that the consolidation of Chequamegon and Madeline would result in more cost efficient service with improved operating efficiencies. Madeline apparently has had a history of service inadequacies and its acquisition by Chequamegon will enable Madeline's subscribers to have better service and receive attention from a management that likely will be more responsive to their needs. The PSCW, after an investigation, found that the Madeline facilities were inadequate and out-of-date, and made its approval of the acquisition of Madeline by Chequamegon subject to the conditions that Chequamegon: agree to reconstruct the Madeline facilities; terminate 2 and 4 party services; accept liability for possible rate refunds; and convert Madeline's subscribers to cooperative status.[15]

8. The combined study area will contain approximately 8,100 access lines. Madeline's share represents only about 5% of this total. Chequamegon estimates that in 1994 it will receive approximately $147,000 and Madeline will receive approximately $156,000 in USF support for their existing study areas, for a total of $303,000. Chequamegon estimates that the consolidated study area would receive USF support of $243,000.[16] As a consequence, USF support payments would be reduced by approximately $60,000 if Chequamegon's estimates are correct. Our independent analysis, as well as the absence of opposing comments, lead us to conclude that the effects of merging these study areas will not have an adverse, unwarranted, effect on the Universal Service Fund.

9. In addition, our concerns regarding future USF effects have been mitigated by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years. The Joint Board recommended, and the Commission adopted, interim rules that will limit the growth of the USF to the rate of growth in the total number of working loops nationwide.[17] That rate has ranged from approximately 2 percent to approximately 3.5 percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive USF growth. The Joint Board has also expressed its intention to evaluate the USF as it currently exists, and reform it to reflect changes in the industry and in technology; pending completion of that proceeding, however, the interim rule adopted by the Commission will remain in effect.[18] These actions should also contain any adverse effects on the USF that the proposed study area waiver might cause that have not otherwise been identified.

10. We conclude, based upon the record before us as a whole, that the petitioner has made the necessary showings that granting the requested waiver petition would be in the public interest and would not adversely effect the USF. In addition, because the PSCW has approved the merger as being in the public interest, we conclude that the petition should be granted.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and §§ 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of Chequamegon Telephone Cooperative for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary. IS GRANTED.

12. IT IS FURTHER ORDERED that this waiver is effective thirty (30) days from the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

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[15] *Id.* at 2-3.

[16] *Id.* at 3.

[17] Recommended Decision, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993).

[18] Report and Order, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 303 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-181

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, to Modify its Ownership of Capacity and Convey Interests in Capacity in the TPC-4 Cable System Pursuant to the TPC-4 Section 214 Authorization

ORDER AND AUTHORIZATION

Adopted: June 13, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Company (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act, as amended. We placed the application on notice on February 23, 1994 and received no comments.

2. In this application, AT&T seeks approval to modify its ownership of capacity in the TPC-4 Cable System in accordance with the updated ownership schedules included in the TPC-4 Cable System Amendatory Agreement No. 1. In the original TPC-4 authorization,[1] AT&T was authorized to own and operate 191 jointly-owned MIUs[2] and 36 wholly-owned MIUs, for a total of 263 MIU half-interests. AT&T now seeks to own and operate 216 jointly-owned MIUs and 6 wholly-owned MIUs, for a total of 228 MIU half-interests. In addition, AT&T seeks authority to transfer, on an indefeasible right of user (IRU) basis, a half-interest in one MIU of capacity in the TPC-4 Cable System between Point Arena, California and Chikura, Japan to its correspondent in New Zealand, Telecom New Zealand International Limited (TNZI).[3] We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-181 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the TPC-4 Cable System, as described in paragraph 2, *supra*.

4. IT IS FURTHER ORDERED that AT&T is authorized to transfer, on an IRU basis, a half-interest in one MIU of capacity between Point Arena, California and Chikura, Japan in the TPC-4 Cable System to its correspondent in New Zealand, TNZI.

5. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *AT&T*, 4 FCC Rcd 8042, 8055 (1989). The TPC-4 Cable System extends between landing points at cable stations at Point Arena, California, Chikura, Japan and Port Alberni, Canada.

[2] A MIU is a unit designated as the minimum unit of investment in the TPC-4 Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64 kilobit per second circuit equivalent.

[3] *See* Appendixes A and B.

SCHEDULE D-1

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS BETWEEN UNITED STATES AND JAPAN
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OTC	DDT	HKTI	VSNL	INDOSAT	IDC	ITJ	KDD	KT	TM	TNZI	CAPWIRE	GMCR	PHILCOM	PLDT	SINGTEL	ITDC	CAT	ITME	SUB TOTAL
TELINTAR	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
OTC	0	0	0	0	0	0	1	7	0	0	0	0	0	0	0	1	0	0	0	9
APTT	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
RTT	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
EMBRATEL	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
ENTEL	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
TD	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
FT	1	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	4
DBP	2	0	0	0	0	0	2	6	1	0	0	0	0	0	1	2	0	0	0	14
BTE	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
ITALCABLE	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
TELMEX	0	0	0	0	0	0	0	2	1	0	0	0	0	0	0	1	0	0	0	4
NPTT	1	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2
TNZI	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
ANTELCO	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	2
BT	1	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2
SPTT	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
BT	0	0	0	2	0	0	0	21	0	0	0	0	0	0	1	0	1	0	0	25
MCL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
AT&T	16	0	7	2	0	2	17	57	16	2	1	0	4	0	12	0	0	3	2	216
FITC	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	0	0	0	3
IDB	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	2
MCII	0	0	0	0	0	0	0	24	0	0	0	0	0	0	2	0	0	0	0	72
CTI	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
SPRINT	2	0	0	0	0	0	0	6	0	0	0	0	0	0	0	0	0	0	0	18
TRT/FTC	2	0	0	0	0	0	1	4	0	0	0	0	0	0	0	1	1	0	0	9
WORLDCOM	1	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2
CANTV	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
SUBTOTAL	39	10	10	2	2	10	47	219	18	3	1	1	4	2	17	10	17	3	2	439

WHOLLY ASSIGNED MIUS

PARTIES	
OTC	1
ITJ	3
KDD	4
AT&T	6
MCII	1
SUBTOTAL	15

TOTAL	441
(# OF WHOLE MIUS)	

NOTE: INCLUDES MIUS ROUTED ON SUBSEGMENT 53.

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
TELINTAR	2	0	2
OTC	44	1	45
APTT	3	0	3
RTT	3	0	3
EMBRATEL	2	0	2
ENTEL	3	0	3
DDT	10	0	10
TD	3	0	3
FT	4	0	4
DBP	14	0	14
HKTI	10	0	10
VSNL	2	0	2
INDOSAT	2	0	2
BTE	3	0	3
ITALCABLE	3	0	3
IDC	10	0	10
ITJ	47	0	47
KDD	219	4	221
KT	18	0	18
TM	3	0	3
TELMEX	2	0	2
NPTT	1	0	1
TNZI	1	0	1
ANTELCO	1	0	1
CAPWIRE	1	0	1
GMCR	4	0	4
PHILCOM	2	0	2
PLDT	17	0	17
SINGTEL	10	0	10
TELEFONICA	2	0	2
BT	2	0	2
SPTT	3	0	3
ITDC	17	0	17
CAT	3	0	3
BT	25	0	25
MCL	0	0	0
AT&T	216	6	219
FITC	3	0	3
IDB	2	0	2
ITME	2	0	2
MCII	72	1	73
CTI	1	0	1
SPRINT	18	0	18
TRT/FTC	9	0	9
WORLDCOM	2	0	2
CANTV	2	0	2
TOTAL	852	15	882

APPENDIX A

SCHEDULE D-4

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS BETWEEN JAPAN AND CANADA
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OTC	JTB	HKTI	VSNL	IDC	ITJ	KDD	KT	TM	PHILCOM	PLDT	SINGTEL	ITDC	CAT	SUBTOTAL
TELEGLOBE	0	1	0	2	2	2	0	2	1	4	4	3	4	1	40
FT	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
ITALCABLE	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
NPTT	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
BT	16	0	0	0	0	0	0	0	0	0	0	0	0	0	16
SUBTOTAL	17	1	0	2	2	2	12	2	1	4	4	3	4	1	63

WHOLLY ASSIGNED MIUS

PARTIES
NONE
SUBTOTAL 0

TOTAL 63
(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OTC	17	0	17
JTB	1	0	1
TELEGLOBE	40		40
FT	1	0	1
HKTI	0	0	0
VSNL	2	0	2
ITALCABLE	1	0	1
IDC	2	0	2
ITJ	2	0	2
KDD	12	0	12
KT	2	0	2
TM	1	0	1
NPTT	1	0	1
PHILCOM	4	0	4
PLDT	4	0	4
SINGTEL	3	0	3
TELEFONICA	1	0	1
ITDC	4	0	4
CAT	1	0	1
BT	16	0	16
TOTAL	126	0	126

APPX. A cont'd

SCHEDULE D-3

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS BETWEEN UNITED STATES AND CANADA
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OPTUS	OTC	TNZI	SUBTOTAL
TELEGLOBE	1	2	2	5
BT	0	3	0	3
SUBTOTAL	1	5	2	8

WHOLLY ASSIGNED MIUS

PARTIES
NONE
SUBTOTAL 0

TOTAL 8

(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OPTUS	1	0	1
OTC	5	0	5
TELEGLOBE	5	0	5
TNZI	2	0	2
BT	3	0	3
TOTAL	16	0	16

APPX A cont'd

SCHEDULE E-1

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT B1
(SU - US)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	CPTUB	OTC	DGT	HKTI	VSNL	INDOSAT	IDC	ITJ	KDD	KT	TM	TNZI	CAPWIRE	GMCR	PHILCOM	PLDT	SINGTEL	ITDC	CAT	IT&E	SUB TOTAL
TELINTAR	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
OTC	0	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	1	0	0	0	3
APTT	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
RTT	0	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
EMBRATEL	0	0	0	0	0	0	1	1	1	0	0	0	0	0	0	0	0	0	0	0	3
TELEGLOBE	1	2	0	0	0	0	0	0	1	0	0	2	0	0	0	0	0	0	0	0	6
ENTEL	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TD	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
FT	0	1	0	0	0	0	0	1	2	1	0	0	0	0	0	1	1	0	0	0	6
DSP	0	2	0	0	0	0	0	2	6	0	0	0	0	0	0	0	2	0	0	0	14
BTE	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	1	0	0	3
ITALCABLE	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	1	0	0	3
TELMEX	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	2
NPTT	0	1	0	0	0	0	0	2	1	0	0	0	0	0	0	0	1	0	0	0	5
TNZI	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
ANTELCO	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	2
ST	0	1	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	3
SPTT	0	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
BT	0	2	0	3	0	0	0	1	21	0	0	0	0	0	0	1	0	1	0	0	31
MCI	0	0	0	0	0	0	1	0	2	0	0	0	0	0	0	0	0	0	0	0	2
AT&T	0	16	0	7	2	2	0	17	87	15	2	1	0	4	0	12	0	0	2	2	210
FITC	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
IDB	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	0	0	0	3
MCII	0	0	0	0	0	0	0	11	34	2	1	0	0	0	2	2	2	2	0	0	73
OTI	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
SPRINT	0	2	2	0	0	0	0	2	8	1	0	0	0	0	0	0	1	1	0	0	16
TRT/FTC	0	2	0	0	0	0	0	1	4	0	0	0	0	0	0	0	1	0	0	0	8
WORLDCOM	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	2
CANTV	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
SUBTOTAL	1	40	10	10	2	2	10	47	210	19	3	3	1	4	2	17	10	17	3	2	434

WHOLLY ASSIGNED MIUS

PARTIES	
OTC	1
ITJ	3
KDD	4
AT&T	6
MCII	1
SUBTOTAL	15

TOTAL	449
(# OF WHOLE MIUS)	

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
TELINTAR	2	0	2
CPTUB	1	0	1
OTC	40	1	81
APTT	1	0	1
RTT	3	0	3
EMBRATEL	3	0	3
TELEGLOBE	6	0	6
ENTEL	1	0	1
DGT	10	0	10
TD	1	0	1
FT	6	0	6
DSP	14	0	14
HKTI	10	0	10
VSNL	2	0	2
INDOSAT	2	0	2
BTE	3	0	3
ITALCABLE	3	0	3
IDC	10	0	10
ITJ	47	0	47
KDD	210	0	210
KT	10	0	10
TM	3	0	3
TELMEX	2	0	2
NPTT	5	0	5
TNZI	1	0	1
ANTELCO	1	0	1
CAPWIRE	1	0	1
GMCR	4	0	4
PHILCOM	2	0	2
PLDT	17	0	17
SINGTEL	10	0	10
TELEFONICA	2	0	2
ST	3	0	3
SPTT	3	0	3
ITDC	17	0	17
CAT	3	0	3
BT	31	0	31
MCI	2	0	2
AT&T	210	0	210
FITC	1	0	1
IDB	3	0	3
IT&E	2	0	2
MCII	73	1	73
OTI	1	0	1
SPRINT	16	0	16
TRT/FTC	8	0	8
WORLDCOM	2	0	2
CANTV	2	0	2
TOTAL	899	15	899

APPENDIX B

APPX B cont'd

SCHEDULE E-9

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT S2
(SU - JA)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OTC	JTB	DGT	HKTI	VSNL	INDOSAT	IDC	ITJ	KDD	KT	TM	THJI	CAPWIRE	GMCR	PHILCOM	PLDT	SINGTEL	ITDC	CAT	IT&E	SUB TOTAL
TELINTAR	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
OTC	0	0	0	0	0	0	0	1	7	0	0	0	0	0	0	0	1	0	0	0	9
APTT	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
RITT	0	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
EMBRATEL	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	3
TELEGLOBE	0	1	0	0	0	0	0	2	0	0	1	0	0	0	0	0	3	0	0	0	46
ENTEL	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
FT	1	0	0	0	0	0	0	1	3	1	0	0	0	0	0	1	0	0	0	0	10
DBP	2	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	2	1	0	0	14
BTE	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	1
ITALCABLE	1	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	1	0	0	4
TELMEX	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	2
NPTT	1	0	0	0	0	0	0	0	2	1	0	0	0	0	0	0	0	1	0	0	6
TNJI	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
ANTELCO	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	1	0	0	0	0	3
ST	1	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	3
SPTT	0	0	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	3
BT	16	0	0	0	0	0	0	1	21	0	0	0	0	0	0	0	0	1	0	0	38
MCL	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	2
AT&T	16	0	0	0	7	2	0	17	97	15	2	1	0	4	0	12	0	0	3	2	216
FITC	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
IDB	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	0	0	0	3
MCII	0	0	0	0	0	0	0	11	34	2	1	0	0	0	2	2	2	2	0	0	73
OTI	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
SPRINT	2	0	0	0	0	0	0	1	8	1	0	0	0	0	0	0	0	1	0	0	16
WTI/FTC	2	0	0	0	0	0	0	1	4	0	0	0	0	0	0	0	1	1	0	0	8
WORLDCOM	1	0	0	0	0	0	0	0	6	0	0	0	0	0	0	0	1	0	0	0	8
CANTV	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2
SUBTOTAL	82	1	10	24	4	2	10	46	222	21	4	1	1	4	8	21	22	21	4	2	489

WHOLLY ASSIGNED MIUS

PARTIES	
OTC	1
ITJ	3
KDD	4
AT&T	6
MCII	1
SUBTOTAL	15

TOTAL	504

(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
TELINTAR	2	0	2
OTC	61	1	63
APTT	1	0	1
RITT	3	0	3
JTB	1	0	1
EMBRATEL	3	0	3
TELEGLOBE	46	0	46
ENTEL	1	0	1
DGT	10	0	10
TD	1	0	1
FT	10	0	10
DBP	14	0	14
HKTI	24	0	24
VSNL	4	0	4
INDOSAT	2	0	2
BTE	1	0	1
ITALCABLE	4	0	4
IDC	18	0	18
ITJ	46	0	46
KDD	222	4	224
KT	21	0	21
TM	4	0	4
TELMEX	2	0	2
NPTT	6	0	6
TNJI	1	0	1
ANTELCO	1	0	1
CAPWIRE	1	0	1
GMCR	4	0	4
PHILCOM	8	0	8
PLDT	21	0	21
SINGTEL	22	0	22
TELEFONICA	3	0	3
ST	3	0	3
SPTT	3	0	3
ITDC	21	0	21
CAT	4	0	4
BT	38	0	38
MCL	2	0	2
AT&T	216	6	220
FITC	1	0	1
IDB	3	0	3
IT&E	2	0	2
MCII	73	1	75
OTI	1	0	1
SPRINT	16	0	16
WTI/FTC	8	0	8
WORLDCOM	8	0	8
CANTV	2	0	2
TOTAL	978	15	1008

APPX B cont'd

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT B3
(BU - CA)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OPTUS	OTC	JTB	HKTI	VSNL	IDC	ITJ	KDD	KT	TNZI	TM	PHILCOM	PLDT	SINGTEL	ITDC	CAT	SUBTOTAL
TELEGLOBE	1	6	1	6	2	2	2	6	2	2	1	4	4	3	4	1	54
FT	6	6	6	6	6	6	6	1	6	6	6	6	6	6	6	6	1
ITALCABLE	6	1	6	6	6	6	6	6	6	6	6	6	6	6	6	6	1
HPTT	6	6	6	6	6	6	6	1	6	6	6	6	6	6	6	6	1
TELEFONICA	6	6	6	6	6	6	6	1	6	6	6	6	6	6	6	6	1
BT	6	13	6	6	6	6	6	6	6	6	6	6	6	6	6	6	13
SUBTOTAL	1	22	1	6	2	2	2	12	2	2	1	4	4	3	4	1	71

WHOLLY ASSIGNED MIUS

PARTIES	
NONE	
SUBTOTAL	6

TOTAL	71
(# OF W HOLE MIUS)	

SCHEDULE E-6

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OPTUS	1	6	1
OTC	22	6	22
JTB	1	6	1
TELEGLOBE	54		54
FT	1	6	1
HKTI	6	6	6
VSNL	2	6	2
ITALCABLE	1	6	1
IDC	2	6	2
ITJ	2	6	2
KDD	12	6	12
KT	2	6	2
TM	1	6	1
HPTT	1	6	1
TNZI	2	6	2
PHILCOM	4	6	4
PLDT	4	6	4
SINGTEL	3	6	3
TELEFONICA	1	6	1
ITDC	4	6	4
CAT	1	6	1
BT	13	6	13
TOTAL	142	6	142

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-235

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, and the China-Japan Section 214 to Modify its Ownership of Capacity in the China-Japan Cable System

ORDER AND AUTHORIZATION

Adopted: June 14, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Co. (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended and the China-Japan Section 214 Authorization, to modify its ownership of capacity in the China-Japan Cable System.[1] We placed the application on public notice on March 30, 1994 and received no comments.

2. Specifically, AT&T seeks approval of revised capacity assignments as reflected in the China-Japan Amendatory Agreement No. 1 (Agreement), filed as Attachment A to the application, in order to accommodate the revised requirements resulting from additional owners joining the China-Japan Cable System. In the original China-Japan Section 214 authorization, AT&T was authorized to own and operate 20 jointly-owned MIUs.[2] It was also contemplated that additional carriers would become owners of the China-Japan Cable System. AT&T now seeks to own and operate 24 jointly-owned assigned MIUs, as shown in Schedule D (*see* Appendix 1). At a cost of approximately $373,000 per half-MIU, AT&T will pay approximately $8.95 million for 24 half-MIUs, plus $.9 million for interest during construction, for a total of $9.85 million. We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-235 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the China-Japan Cable System, as described in paragraph 2, *supra*.

4. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *AT&T*, 7 FCC Rcd 5268 (1992). The China-Japan Cable System extends between landing points at cable stations at Nanhui, Shanghai City, China and Miyazaki, Japan.

[2] A MIU is a unit designated as the minimum investment in the China-Japan Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64 kilobit per second circuit equivalent.

SCHEDULE D

ASSIGNMENT OF MIUS IN SEGMENT B
OF THE C-J CABLE SYSTEM

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	DGT
AT&T	24
BT	1
DACOM	2
DBP-T	2
EMBRATEL	1
HTC	1
IDC	12
ITALCABLE	2
ITJ	12
KDD	42
KT	3
MCII	10
OPTUS	1
PLDT	2
SINGTEL	7
SPRINT	5
TELEGLOBE	2
TELSTRA	5
TM	1
TOTAL	135

SUMMARY

PARTIES	JOINTLY ASSIGNED
AT&T	24
BT	1
DACOM	2
DBP-T	2
DGT	135
EMBRATEL	1
HTC	1
IDC	12
ITALCABLE	2
ITJ	12
KDD	42
KT	3
MCII	10
OPTUS	1
PLDT	2
SINGTEL	7
SPRINT	5
TELSTRA	5
TELEGLOBE	2
TM	1
TOTAL	270

NOTE: THE NOTIONAL CAPACITY OF THE CHINA-JAPAN CABLE SYSTEM IS 135 MIUS.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of the	CSR-3745-M
Mississippi Authority for	TN0063
Educational Television	
against Time Warner Cable	

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; Released: June 29, 1994

By the Commission: Commisioners Ness and Chong not participating.

1. On July 8, 1993, an "Application for Review" of the decision in *Mississippi Authority for Educational Television against Time Warner Cable*, 8 FCC Rcd 3971 (1993), was filed by the Mississippi Authority for Educational Television ("MAET"), licensee of Station WMAV-TV (Educ., Channel 18), Oxford, Mississippi. Time Warner Cable ("TWC") filed an "Opposition To Application For Review" on July 23, 1993, and MAET replied to it on August 5, 1993.

2. In the underlying decision, the Bureau denied MAET's claim to mandatory carriage on TWC's Memphis, Tennessee cable system, finding that MAET was not eligible for such carriage under established criteria. Specifically, the Bureau determined that WMAV-TV did not place a Grade B signal contour over the cable system's principal headend nor was the station's reference point within fifty miles of that headend. In its request for review, MAET notes that the cable system's principal headend in Memphis, Tennessee is ". . . just barely (1.529 miles) beyond Station WMAV-TV's Grade B contour and the 50-mile rule applicable to Station WMAV-TV." MAET adds that §73 - 63 - 1 of the Mississippi Code of 1972 gives it the responsibility for administering, operating, controlling, and supervising, educational radio and television in that state. Therefore, MAET argues, it must have carriage on the cable system serving Memphis to reach subscribers in northwest Mississippi. According to MAET, the cable system's designation of the Memphis headend as its principal one effectively frustrates MAET's statutory mandate from the State of Mississippi, and it is contrary to the public interest policy inherent in the broad dissemination of noncommercial educational programming. MAET also claims that this headend designation was meant to circumvent the system's mandatory carriage obligations, and it urges the Commission to reverse the Bureau's initial decision expeditiously, citing the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2968 (1993).

3. In response, TWC notes that, of the five headends which the Memphis cable system might have designated as its principal one, the one so chosen was in fact the closest to WMAV-TV's reference point, and that each of the others was also beyond WMAV-TV's Grade B contour and more than fifty miles from its reference point. According to TWC, its system has four headends at Whitehaven, Union Extension, Raleigh, and Agricenter, which are 55.870, 58.965, 62.239, and 54.918 miles from WMAV-TV's reference point, respectively. In addition to housing the master control center, the Memphis headend also contains most of the system's signal processing equipment and is the source of all the system's programming. TWC states that choosing Memphis as its principal headend is fully consistent with Commission guidelines, and it asks that MAET's application be denied as meritless.

4. In reply, MAET reiterates its prior assertions, adding that it is not in the public interest to permit a Tennessee cable system that serves areas in Mississippi to specify only headend locations that are outside Mississippi and beyond the Grade B contours as well as more than fifty miles from the applicable reference points of Mississippi public television stations.

5. When the Commission adopted its *Report and Order in MM Docket No. 92-259, supra*, it enumerated certain factors it intended to consider when evaluating a complaint from a noncommercial educational station concerning a cable system's designation of its principal headend. The Commission noted that a cable operator would bear a "significant burden in demonstrating the reasonableness" of its headend designation if the site chosen did not serve the majority of its subscribers, or did not have the majority of the system's signal processing equipment, or were not the closest to the geographic center of the cable system. In this instance, TWC's choice satisfies one of these factors: it has the majority of the system's signal processing equipment. MAET has not substantiated its allegation that TWC abused its discretion by not selecting an alternate location consistent with Commission guidelines where WMAV-TV would be entitled to mandatory carriage,[1] nor has MAET specified the possible location of any such alternate site. Indeed, it appears from the record before us that TWC in fact chose the site that was the closest to WMAV-TV of all of TWC's headends.

6. In view of the foregoing, we find that grant of MAET's application for review is not in the public interest.

7. Accordingly, IT IS ORDERED, That the "Application for Review" (CSR-3745), filed July 8, 1993, by the Mississippi Authority for Educational Television IS DENIED.

[1] We also note that TWC previously indicated that it already carries Station WKNO-TV (Channel 10), a noncommercial educational station licensed to Memphis, Tennessee, which is entitled to carriage on the cable system under the must-carry rules.

SCHEDULE D-6

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS BETWEEN JAPAN AND CANADA
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OTC	JTB	HKTI	VSNL	IDC	ITJ	KDD	KT	TM	PHILCOM	PLDT	SINGTEL	ITDC	CAT	SUBTOTAL
TELEGLOBE	0	1	0	2	2	2	0	2	1	4	4	3	4	1	46
FT	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
ITALCABLE	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
NPTT	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
BT	16	0	0	0	0	0	0	0	0	0	0	0	0	0	16
SUBTOTAL	17	1	0	2	2	2	12	2	1	4	4	3	4	1	63

WHOLLY ASSIGNED MIUS

PARTIES	
NONE	
SUBTOTAL	0

TOTAL	63
(# OF WHOLE MIUS)	

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OTC	17	0	17
JTB	1	0	1
TELEGLOBE	46		46
FT	1	0	1
HKTI	0	0	0
VSNL	2	0	2
ITALCABLE	1	0	1
IDC	2	0	2
ITJ	2	0	2
KDD	12	0	12
KT	2	0	2
TM	1	0	1
NPTT	1	0	1
PHILCOM	4	0	4
PLDT	4	0	4
SINGTEL	3	0	3
TELEFONICA	1	0	1
ITDC	4	0	4
CAT	1	0	1
BT	16	0	16
TOTAL	126	0	126

APPX A cont'd

SCHEDULE D-3

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS BETWEEN UNITED STATES AND CANADA
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OPTUS	OTC	TNZI	SUBTOTAL
TELEGLOBE	1	2	2	5
BT	0	3	0	3
SUBTOTAL	1	5	2	8

WHOLLY ASSIGNED MIUS

PARTIES	
NONE	
SUBTOTAL	0

TOTAL 8
(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OPTUS	1	0	1
OTC	5	0	5
TELEGLOBE	5	0	5
TNZI	2	0	2
BT	3	0	3
TOTAL	16	0	16

APPX A cont'd

SCHEDULE E-1

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT B1
(BJ - US)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OPTUS	OTC	DGT	HKT	VSNL	INDOSAT	IDC	ITJ	KDD	KT	TM	TNB	CAPWIRE	GMCR	PHILCOM	PLDT	SINGTEL	ITDC	CAT	IT&E	SUB TOTAL
TELINTAR	0	0	0	0	0		0	0	1	1	0	0	0	0	0	0	0	0	0	0	2
OTC	0	0	0	0	0		0	0	1	7	0	0	0	0	0	0	1	0	0	0	9
APTT	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
RTT	0	0	0	0	0		0	0	1	2	0	0	0	0	0	0	0	0	0	0	3
EMBRATEL	0	0	0	0	0		0	1	1	1	0	0	0	0	0	0	0	0	0	0	3
TELEGLOBE	1	2	0	0	0		0	0	0	1	0	0	2	0	0	0	0	0	0	0	6
ENTEL	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
TD	0	0	0	0	0		0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
FT	0	1	0	0	0		0	0	3	2	1	0	0	0	0	1	0	0	0	0	8
DBP	0	2	0	0	0		0	1	2	0	0	0	0	0	0	0	2	1	0	0	14
BTE	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	0	1	0	0	2
ITALCABLE	0	0	0	0	0		0	0	0	2	0	0	0	0	0	0	0	0	0	0	2
TELMEX	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	1	0	0	0	2
NPTT	0	1	0	0	0		0	0	2	1	0	0	0	0	0	0	0	1	0	0	5
TNB	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
ANTELCO	0	0	0	0	0		0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0		0	0	0	1	0	0	0	0	0	1	0	0	0	0	2
ST	0	1	0	0	0		0	0	0	2	0	0	0	0	0	0	0	0	0	0	3
SPTT	0	0	0	0	0		0	0	1	2	0	0	0	0	0	0	0	0	0	0	3
BT	0	3	0	3	0		0	1	21	0	0	0	0	0	0	1	0	1	0	0	31
MCI	0	0	0	0	0		0	0	2	0	0	0	0	0	0	0	0	0	0	0	2
AT&T	0	16	0	7	2		0	17	97	15	2	1	0	4	0	12	0	0	3	0	219
FITC	0	0	0	0	0		0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
IDB	0	0	0	0	0		0	0	2	0	0	0	0	0	0	0	1	0	0	0	3
MCI	0	0	0	0	0		0	2	11	2	0	0	0	0	2	0	2	2	0	0	72
OTI	0	0	0	0	0		0	1	0	1	0	0	0	0	0	0	0	0	0	0	1
SPRINT	0	2	2	0	0		0	0	4	0	0	0	0	0	0	0	0	1	0	0	9
TRT/FTC	0	2	0	0	0		0	0	4	0	0	0	0	0	0	0	1	1	0	0	9
WORLDCOM	0	1	0	0	0		0	1	5	1	0	0	0	0	0	0	0	0	0	0	8
CANTV	0	0	0	0	0		0	0	1	0	0	0	0	0	0	0	0	0	0	0	2
SUBTOTAL	1	49	10	10	2	2	10	47	210	19	3	3	1	4	2	17	10	17	3	2	434

WHOLLY ASSIGNED MIUS

PARTIES	
OTC	1
ITJ	3
KDD	4
AT&T	6
MCI	1
SUBTOTAL	15

TOTAL	449
(# OF WHOLE MIUS)	

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
TELINTAR	2	0	2
OPTUS	1	0	1
OTC	49	1	51
APTT	1	0	1
RTT	3	0	3
EMBRATEL	3	0	3
TELEGLOBE	6	0	6
ENTEL	1	0	1
DGT	10	0	10
TD	1	0	1
FT	8	0	8
DBP	14	0	14
HKT	10	0	10
VSNL	2	0	2
INDOSAT	2	0	2
BTE	1	0	1
ITALCABLE	2	0	2
IDC	10	0	10
ITJ	47	0	47
KDD	210	4	212
KT	19	0	19
TM	3	0	3
TELMEX	2	0	2
NPTT	5	0	5
TNB	1	0	1
ANTELCO	1	0	1
CAPWIRE	1	0	1
GMCR	4	0	4
PHILCOM	2	0	2
PLDT	17	0	17
SINGTEL	10	0	10
TELEFONICA	2	0	2
ST	3	0	3
SPTT	3	0	3
ITDC	17	0	17
CAT	3	0	3
BT	31	0	31
MCI	2	0	2
AT&T	219	0	219
FITC	1	0	1
IDB	3	0	3
IT&E	2	0	2
MCI	72	1	73
OTI	1	0	1
SPRINT	10	0	10
TRT/FTC	9	0	9
WORLDCOM	8	0	8
CANTV	2	0	2
TOTAL	868	15	883

Appendix

SCHEDULE E-7

APPX B cont'd

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT B2
(BJ - JA)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OTC	JTB	DGT	HKTI	VSNL	INDOSAT	IDC	ITJ	KDD	KT	TM	TNZ	CAPWIRE	GMCR	PHILCOM	PLDT	SINGTEL	ITDC	CAT	IT&E	SUB TOTAL
TELINTAR	0	0	0	0	0		0	0	1	1	0	0	0		0	0		0	0	0	2
OTC	0	0	0	0	0		0	0	1	7	0	0	0		0	0		0	0	0	8
APTT	0	0	0	0	0		0	0	0	1	0	0	0		0	0	0	0	0	0	1
RITT	0	0	0	0	0		0	0	1	2	0	0	0		0	0	0	0	0	0	3
EMBRATEL	0	0	0	0	0		0	1	2	1	0	0	0		0	0	0	0	0	0	3
TELEGLOBE	0	1	0	0	2		0	2	8	2	0	1	0		0	4	3	0	1	0	40
ENTEL	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
TD	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
FT	1	0	0	0	0		0	0	3	1	0	0	0		0	0	1	0	0	0	10
DBP	2	0	0	0	0		0	1	2	0	0	0	0		0	0	2	1	0	0	14
BTE	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
ITALCABLE	1	0	0	0	0		0	0	2	0	0	0	0		0	0	0	1	0	0	4
TELMEX	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	1	0	0	2
NPTT	1	0	0	0	0		0	0	2	0	0	0	0		0	0	1	1	0	0	6
TNZ	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
ANTELCO	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0		0	0	2	0	0	0	0		0	1	0	0	0	0	3
BT	1	0	0	0	0		0	0	2	0	0	0	0		0	0	0	0	0	0	3
SPTT	0	0	0	0	0		0	1	2	0	0	0	0		0	0	0	0	0	0	3
BT	10	0	0	2	0		0	1	11	0	0	0	0		0	1	0	0	0	0	36
MCI	0	0	0	0	0		0	0	2	0	0	0	0		0	0	0	0	0	0	2
AT&T	16	0	0	7	2		10	17	87	15	2	1	0		0	12	0	0	2	2	216
FITC	0	0	0	0	0		0	0	0	0	0	0	1		0	0	0	0	0	0	1
IDB	0	0	0	0	0		0	0	2	0	0	0	0		0	0	1	0	0	0	3
MCII	0	0	0	0	0		0	2	34	2	1	0	0		0	2	2	2	0	0	72
ITI	0	0	0	0	0		0	0	1	0	0	0	0		0	0	0	0	0	0	1
SPRINT	2	0	2	0	0		0	2	8	1	0	0	0		0	0	0	1	0	0	16
TRT/FTC	2	0	0	0	0		0	1	4	0	0	0	0		0	0	1	1	0	0	9
WORLDCOM	1	0	0	0	0		0	1	3	0	0	0	0		0	0	1	0	0	0	6
CANTV	0	0	0	0	0		0	1	1	0	0	0	0		0	0	0	0	0	0	2
SUBTOTAL	82	1	10	24	4		2	16	49	222	21	4	1		1	4	6	21	22	21	4	2	488

WHOLLY ASSIGNED MIUS

PARTIES	
OTC	1
ITJ	3
KDD	4
AT&T	6
MCII	1
SUBTOTAL	15

TOTAL	504

(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
TELINTAR	2	0	2
OTC	61	1	63
APTT	1	0	1
RITT	3	0	3
JTB	1	0	1
EMBRATEL	3	0	3
TELEGLOBE	40	0	40
ENTEL	1	0	1
DGT	10	0	10
TD	1	0	1
FT	10	0	10
DBP	14	0	14
HKTI	24	0	24
VSNL	4	0	4
INDOSAT	2	0	2
BTE	1	0	1
ITALCABLE	4	0	4
IDC	16	0	16
ITJ	49	3	50
KDD	222	4	224
KT	21	0	21
TM	4	0	4
TELMEX	2	0	2
NPTT	6	0	6
TNZ	2	0	2
ANTELCO	1	0	1
CAPWIRE	1	0	1
GMCR	4	0	4
PHILCOM	6	0	6
PLDT	21	0	21
SINGTEL	22	0	22
TELEFONICA	3	0	3
BT	3	0	3
SPTT	3	0	3
ITDC	21	0	21
CAT	4	0	4
BT	36	0	36
MCI	2	0	2
AT&T	216	0	220
FITC	1	0	1
IDB	3	0	3
IT&E	2	0	2
MCII	73	1	73
ITI	1	0	1
SPRINT	16	0	16
TRT/FTC	9	0	9
WORLDCOM	6	0	6
CANTV	2	0	2
TOTAL	878	15	1008

APPX B cont'd

TPC-4 CABLE SYSTEM
ASSIGNMENT OF MIUS IN SUBSEGMENT B3
(BU – CA)

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	OPTUS	OTC	JTB	HKTI	VSNL	IDC	ITJ	KDD	KT	TNZI	TM	PHILCOM	PLDT	SINGTEL	ITDC	CAT	SUBTOTAL
TELEGLOBE	1	8	1	0	2	2	2	9	2	2	1	4	4	3	4	1	84
FT	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
ITALCABLE	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
NPTT	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
TELEFONICA	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13
BT	0	13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
SUBTOTAL	1	22	1	0	2	2	2	12	2	2	1	4	4	3	4	1	71

WHOLLY ASSIGNED MIUS

PARTIES
NONE
SUBTOTAL 0

TOTAL 71

(# OF W HOLE MIUS)

SCHEDULE E-3

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	MIU 1/2 INTERESTS
OPTUS	1	0	1
OTC	22	0	22
JTB	1	0	1
TELEGLOBE	84		84
FT	1	0	1
HKTI	0	0	0
VSNL	2	0	2
ITALCABLE	1	0	1
IDC	2	0	2
ITJ	2	0	2
KDD	12	0	12
KT	2	0	2
TM	1	0	1
NPTT	1	0	1
TNZI	2	0	2
PHILCOM	4	0	4
PLDT	4	0	4
SINGTEL	3	0	3
TELEFONICA	1	0	1
ITDC	4	0	4
CAT	1	0	1
BT	13	0	13
TOTAL	142	0	142

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-235

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, and the China-Japan Section 214 to Modify its Ownership of Capacity in the China-Japan Cable System

ORDER AND AUTHORIZATION

Adopted: June 14, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Co. (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended and the China-Japan Section 214 Authorization, to modify its ownership of capacity in the China-Japan Cable System.[1] We placed the application on public notice on March 30, 1994 and received no comments.

2. Specifically, AT&T seeks approval of revised capacity assignments as reflected in the China-Japan Amendatory Agreement No. 1 (Agreement), filed as Attachment A to the application, in order to accommodate the revised requirements resulting from additional owners joining the China-Japan Cable System. In the original China-Japan Section 214 authorization, AT&T was authorized to own and operate 20 jointly-owned MIUs.[2] It was also contemplated that additional carriers would become owners of the China-Japan Cable System. AT&T now seeks to own and operate 24 jointly-owned assigned MIUs, as shown in Schedule D (*see* Appendix 1). At a cost of approximately $373,000 per half-MIU, AT&T will pay approximately $8.95 million for 24 half-MIUs, plus $.9 million for interest during construction, for a total of $9.85 million. We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-235 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the China-Japan Cable System, as described in paragraph 2, *supra*.

4. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *AT&T*, 7 FCC Rcd 5268 (1992). The China-Japan Cable System extends between landing points at cable stations at Nanhui, Shanghai City, China and Miyazaki, Japan.

[2] A MIU is a unit designated as the minimum investment in the China-Japan Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64 kilobit per second circuit equivalent.

SCHEDULE D

ASSIGNMENT OF MIUS IN SEGMENT B OF THE C-J CABLE SYSTEM

JOINTLY ASSIGNED MIU CAPACITY

PARTIES	DGT
AT&T	24
BT	1
DACOM	2
DBP-T	2
EMBRATEL	1
HTC	1
IDC	12
ITALCABLE	2
ITJ	12
KDD	42
KT	3
MCII	10
OPTUS	1
PLDT	2
SINGTEL	7
SPRINT	5
TELEGLOBE	2
TELSTRA	5
TM	1
TOTAL	135

SUMMARY

PARTIES	JOINTLY ASSIGNED
AT&T	24
BT	1
DACOM	2
DBP-T	2
DGT	135
EMBRATEL	1
HTC	1
IDC	12
ITALCABLE	2
ITJ	12
KDD	42
KT	3
MCII	10
OPTUS	1
PLDT	2
SINGTEL	7
SPRINT	5
TELSTRA	5
TELEGLOBE	2
TM	1
TOTAL	270

NOTE: THE NOTIONAL CAPACITY OF THE CHINA-JAPAN CABLE SYSTEM IS 135 MIUS.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of the	CSR-3745-M
Mississippi Authority for	TN0063
Educational Television	
against Time Warner Cable	

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1994; Released: June 29, 1994

By the Commission: Commisioners Ness and Chong not participating.

1. On July 8, 1993, an "Application for Review" of the decision in *Mississippi Authority for Educational Television against Time Warner Cable*, 8 FCC Rcd 3971 (1993), was filed by the Mississippi Authority for Educational Television ("MAET"), licensee of Station WMAV-TV (Educ., Channel 18), Oxford, Mississippi. Time Warner Cable ("TWC") filed an "Opposition To Application For Review" on July 23, 1993, and MAET replied to it on August 5, 1993.

2. In the underlying decision, the Bureau denied MAET's claim to mandatory carriage on TWC's Memphis, Tennessee cable system, finding that MAET was not eligible for such carriage under established criteria. Specifically, the Bureau determined that WMAV-TV did not place a Grade B signal contour over the cable system's principal headend nor was the station's reference point within fifty miles of that headend. In its request for review, MAET notes that the cable system's principal headend in Memphis, Tennessee is ". . . just barely (1.529 miles) beyond Station WMAV-TV's Grade B contour and the 50-mile rule applicable to Station WMAV-TV." MAET adds that §73 - 63 - 1 of the Mississippi Code of 1972 gives it the responsibility for administering, operating, controlling, and supervising, educational radio and television in that state. Therefore, MAET argues, it must have carriage on the cable system serving Memphis to reach subscribers in northwest Mississippi. According to MAET, the cable system's designation of the Memphis headend as its principal one effectively frustrates MAET's statutory mandate from the State of Mississippi, and it is contrary to the public interest policy inherent in the broad dissemination of noncommercial educational programming. MAET also claims that this headend designation was meant to circumvent the system's mandatory carriage obligations, and it urges the Commission to reverse the Bureau's initial decision expeditiously, citing the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2968 (1993).

3. In response, TWC notes that, of the five headends which the Memphis cable system might have designated as its principal one, the one so chosen was in fact the closest to WMAV-TV's reference point, and that each of the others was also beyond WMAV-TV's Grade B contour and more than fifty miles from its reference point. According to TWC, its system has four headends at Whitehaven, Union Extension, Raleigh, and Agricenter, which are 55.870, 58.965, 62.239, and 54.918 miles from WMAV-TV's reference point, respectively. In addition to housing the master control center, the Memphis headend also contains most of the system's signal processing equipment and is the source of all the system's programming. TWC states that choosing Memphis as its principal headend is fully consistent with Commission guidelines, and it asks that MAET's application be denied as meritless.

4. In reply, MAET reiterates its prior assertions, adding that it is not in the public interest to permit a Tennessee cable system that serves areas in Mississippi to specify only headend locations that are outside Mississippi and beyond the Grade B contours as well as more than fifty miles from the applicable reference points of Mississippi public television stations.

5. When the Commission adopted its *Report and Order in MM Docket No. 92-259, supra*, it enumerated certain factors it intended to consider when evaluating a complaint from a noncommercial educational station concerning a cable system's designation of its principal headend. The Commission noted that a cable operator would bear a "significant burden in demonstrating the reasonableness" of its headend designation if the site chosen did not serve the majority of its subscribers, or did not have the majority of the system's signal processing equipment, or were not the closest to the geographic center of the cable system. In this instance, TWC's choice satisfies one of these factors: it has the majority of the system's signal processing equipment. MAET has not substantiated its allegation that TWC abused its discretion by not selecting an alternate location consistent with Commission guidelines where WMAV-TV would be entitled to mandatory carriage,[1] nor has MAET specified the possible location of any such alternate site. Indeed, it appears from the record before us that TWC in fact chose the site that was the closest to WMAV-TV of all of TWC's headends.

6. In view of the foregoing, we find that grant of MAET's application for review is not in the public interest.

7. Accordingly, IT IS ORDERED, That the "Application for Review" (CSR-3745), filed July 8, 1993, by the Mississippi Authority for Educational Television IS DENIED.

[1] We also note that TWC previously indicated that it already carries Station WKNO-TV (Channel 10), a noncommercial educational station licensed to Memphis, Tennessee, which is entitled to carriage on the cable system under the must-carry rules.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-224

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Modify the Ownership of Capacity in the HAW-5 Cable System Pursuant to the HAW-5 Section 214 Authorization

ORDER AND AUTHORIZATION

Adopted: June 13, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Company (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended. We placed the application on notice on March 16, 1994 and received no comments.

2. Specifically, AT&T seeks approval of revised capacity assignments as reflected in the HAW-5 Amendatory Agreement (No.2) (Agreement), filed as Attachment B to the application. In order to accommodate the revised requirements, the design capacity of the cable has been expanded by activating a third fiber pair which provides an additional 252 MIUs.[1] AT&T was originally authorized to own and operate 82 jointly-owned MIUs and 221 wholly-owned MIUs, for a total of 524 half-MIUs.[2] AT&T now requests authority to own and operate 65 jointly-owned MIUs and 352 wholly-owned MIUs for a total of 769 half-MIUs.[3] Upon review of the application, we find that the present and future public convenience and necessity require its grant.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-94-224 IS GRANTED and AT&T is authorized to modify its ownership of capacity in the HAW-5 Cable System, as described in para 2, *supra*.[4]

4. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The third fiber pair was originally intended to serve as restoration capacity for the cable system. However, in the Amendatory Agreement No.1 the cable owners decided to activate this third pair. *See* Application at 3.

[2] A MIU is a unit designated as the minimum unit of investment in the HAW-5 Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64-Kbps equivalent circuit.

[3] The HAW-5 Cable System was initially estimated at a cost of $199 million. The actual cost is $161.5 million. Therefore, the cable system's original notional capacity of 1008 half-MIUs had a unit cost of approximately $160,000 per half-MIU. The notional capacity of the cable has increased to 1372 half-MIU by the activation of the third fiber pair. As a result, the unit cost per half-MIU is approximately $118,000. AT&T's toal cost for 769 half-MIUs would be approximately $90 million, or an increase of $6.9 million.

[4] The HAW-5 Cable System extends between landing points at cable stations at San Luis, Obispo, California and Keawaula, Hawaii. AT&T was authorized to own and operate capacity in HAW-5 pursuant to *AT&T*, 5 FCC Rcd 7344 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-242

Application for Authorization, to Transfer Interests in Capacity in the U.S. - Bahamas Cable System

ORDER AND CERTIFICATE

Adopted: June 13, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by American Telephone and Telegraph Company (AT&T), pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, we find that the present and future public convenience and necessity require grant of this application to transfer, on an Indefeasible Right of User (IRU) basis, half-interests in 5 circuits in the U.S. - Bahamas Cable System[1] to the St. Thomas & San Juan Telephone Co., Inc. (STSJ)

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-242 IS GRANTED and AT&T is authorized to transfer, on an IRU basis, half-interests in 5 circuits in the U.S. - Bahamas Cable System to STSJ.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The U.S. - Bahamas Cable System extends between landing points at cable stations at West Palm Beach, Florida; Eight Mile Rock, Grand Bahama Island; and Nassau Bahama Island. AT&T was authorized to own and operate capacity in the U.S. - Bahamas Cable System pursuant to *AT&T*, 27 F.C.C. 2d 907 (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-243

Application for Authorization pursuant to the TAT-11 Section 214 Authorization, to Modify Its Ownership of Capacity, and to Convey Interests in Capacity in the TAT-11 Cable System

ORDER AND AUTHORIZATION

Adopted: June 13, 1994; **Released: June 29, 1994**

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Company (AT&T) filed the above-captioned application, pursuant to the TAT-11 Cable System Section 214 Authorization, to modify its ownership of capacity and to convey interests in capacity in the TAT-11 Cable System. The application was placed on public notice on April 6, 1994 and no comments were received.

2. Specifically, AT&T seeks approval to revised capacity assignments as reflected in the TAT-11 Cable System's Supplementary Agreement No.1, filed as Attachment A to the application.[1] Originally, AT&T was authorized to own and operate 62 wholly-owned and 112 jointly-owned MIUs[2] in the U.S. - U.K. segment, and 9 wholly-owned and 25 jointly-owned MIUs in the U.S. - France segment, for a total of 279 half-interests in MIUs. AT&T now requests authority to adjust its ownership to 7 wholly-owned and 27 jointly-owned MIUs in the U.S. - France segment, for a revised total of 277 half-interests in MIUs in the TAT-11 Cable System.

3. In addition, AT&T also seeks approval to transfer, on an Indefeasible Right of Use (IRU) basis, a half-interest in one (1) MIU in the U.S. - France segment to Arento, its correspondent in Egypt, in order to accommodate a joint service requirement. Upon review of the application, we find that the present and future public convenience and necessity require its grant.

4. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-243 IS GRANTED and AT&T is authorized to modify its ownership of capacity in the TAT-11 Cable System, as described in para. 2, *supra*.

5. IT IS FURTHER ORDERED that AT&T is authorized to transfer, on an IRU basis, a half-interest in one (1) MIU in the U.S. - France segment of the TAT-11 Cable System to Arento, its correspondent in Egypt.

6. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The TAT-11 Cable System extends between landing points at cable stations at Manahawkin, New Jersey; Oxwich Bay, United Kingdom; and St. Hilaire, France. Originally, the TAT-11 Cable System was to land at Lyme Bay, United Kingdom. AT&T was authorized to own and operate the TAT-11 Cable System pursuant to *AT&T*, 7 FCC Rcd 136 (1992).

[2] A MIU is a unit designated as the minimum unit of investment in the TAT-11 Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64-kilobit per second equivalent circuit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-244

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in Two Digital Submarine Cable Systems Between Germany and Sweden

ORDER AND AUTHORIZATION

Adopted: June 13, 1994; Released: June 29, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed, pursuant to Section 214 of the Communications Act, as amended, by American Telephone and Telegraph Company (AT&T), we find that the present and future public convenience and necessity require the grant of this application.

2. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-244 IS GRANTED and AT&T is authorized to:

a. acquire, on an ownership basis, and operate capacity in two digital submarine cable systems, the Germany-Sweden No. 4[1] and No. 5[2] Cable Systems (Germany-Sweden Nos. 4 & 5);[3]

b. acquire by lease or other comparable means such extension facilities as may be needed to extend the capacity to be acquired in the Germany-Sweden Nos. 4 & 5 Cable Systems; and

c. activate capacity in the Germany-Sweden Nos. 4 & 5 Cable Systems and in the aforementioned extension facilities for the provision of AT&T's authorized services.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order. (*See* Section 1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The Germany-Sweden No. 4 Cable system extends between landing points at Burg, Germany and at Trelleborg, Sweden. This cable system is divided into three segments: Segment 1 consists of the cable station at Burg, Germany; Segment 2 consists of the whole of the submarine cable between the beach joints at the Segment 1 and Segment 3 cable stations; and Segment 3 consists of the cable station at Trelleborg, Sweden.

[2] The Germany-Sweden No. 5 Cable System extends between landing points at Ribnitz, Germany and Ystad, Sweden. This cable system is divided into three segments: Segment 1 consists of the cable station at Ribnitz, Germany; Segment 2 consists of the whole of the submarine cable between the beach joints at the Segment 1 and Segment 3 cable stations; and Segment 3 consists of the cable station at Ystad, Sweden.

[3] The Germany-Sweden Nos. 4 & 5 Cable Systems will be extended by suitable facilities to the borders of other countries, enabling these systems to be used for services between and among the United States, Germany and Sweden. Each cable system consists of two working unrepeatered fiber pairs. The capacity is provided in sixteen 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIUs) for a total capacity of 504 MIUs. A MIU is a 2.048 Mbit/s digital bit stream and consists of two half-interests which are intended for use between two correspondents respectively for joint working. AT&T's current percentage interest in the Germany-Sweden Nos. 4 & 5 Cable Systems is 0.1305% as shown in Schedule B1 to Attachment C filed with the application. AT&T's capital cost for a half-MIU in Segments 1 and 2 is $18,968.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southern Pacific Telecommunications Company, Complainant,

v.

WilTel, Inc., and, WilTel Business Networks, Inc., Defendants.

File Nos. E-94-28, and E-94-29

ORDER

Adopted: June 20, 1994; Released: June 29, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 21, 1993, Southern Pacific Telecommunications Company (SPT) filed the above-captioned formal complaints against WilTel, Inc., and WilTel Business Networks, Inc. (together "WilTel"). The complainant alleged that SPT is entitled to damages and other relief arising from claims brought under Title II of the Communications Act. WilTel denied liability for all such claims.

2. On June 13, 1994, the parties filed a joint motion requesting the Commission to enter an order dismissing the complaint with prejudice. In support of their motion, the parties state that all claims in the action against WilTel have been settled, with WilTel admitting no liability herein. The parties also state that no purpose would be served by the continuing pendency of these proceedings.

3. We are satisfied that granting the parties' motion to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission rules, 47 C.F.R. § 0.291, that the parties joint motion to dismiss IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceeding ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corp. File No. I-T-C-94-249

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and the Columbia/TDRSS Satellite System for the provision of private line services.

ORDER AND AUTHORIZATION

Adopted: June 15, 1994; Released: June 30, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by MCI Telecommunications Corporation (MCI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-249 IS GRANTED, and MCI is authorized to:

a. lease from the Columbia Communications Corporation and operate one E-1 and four T-1 satellite circuits between the Washington International Teleport (WIT) earth station in Alexandria, Virginia and an earth station at Vaihineen, Germany, via the TDRS satellite system;

b. lease and operate one E-1 and four T-1 circuits in the WIT earth station to be used in conjunction with the space segment;

c. lease and operate one E-1 and four T-1 circuits between the WIT earth station and MCI's Washington, D.C. operating office; and

d. use said facilities to provide private line services not interconnected with the public switched network for the Department of Defense between the Pentagon, Virginia military base and the U.S. military base located at Patch Barracks, Vaihineen, Germany.

3. IT IS FURTHER ORDERED that MCI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

4. IT IS FURTHER ORDERED that MCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that MCI shall file a separate Section 214 authorization for the use of any additional circuits over separate satellite systems.

6. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling it or controlled by it are parties.

7. IT IS FURTHER ORDERED that MCI's authorization to provide private lines is limited to the provision of such private lines only between the United States and Germany--that is, private lines which originate in the United States and terminate in Germany or which originate in Germany and terminate in the United States. In addition, MCI may not - and MCI's tariffs must state that its customers may not - connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

PACTEL CELLULAR File No. 216MS0031

Station KNKA236 in the Domestic Public Cellular Radio Telecommunications Service serving Market 18B, San Diego, California

ORDER

Adopted: June 13, 1994; Released: June 30, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. PacTel Cellular (PacTel) is the licensee of the captioned station in the Domestic Public Cellular Radio Telecommunications Service, on frequency Block B (nonwireline). In February 1991, the Mobile Services Division (MSD) granted developmental authorization to PacTel to conduct field tests using experimental radio equipment. The authorization was to expire on February 6, 1992, and PacTel was to file a report about its field tests at the close of the developmental period. PacTel filed the required report on June 10, 1992. On July 20, 1992, PacTel submitted a request for Special Temporary Authority to continue tests initiated under the previously granted and expired developmental authorization and also filed an application to continue testing. On July 27, 1992, the MSD granted PacTel a one-year developmental authorization but the following day set aside the grant when it appeared that developmental testing had continued past the expiration date. The MSD directed PacTel to provide the Commission with details surrounding the unauthorized developmental testing and steps PacTel would take to prevent a recurrence. PacTel provided its explanations on August 3, 1992, and as a result, the MSD granted PacTel a one-year developmental authorization through August 3, 1993. In addition, on February 2, 1993, the Commission released a Notice of Apparent Liability (NAL) against PacTel in the amount of $34,000 for apparent violations of Section 301 of the Communications Act and Sections 22.3 and 22.406(a) of the Commission's Rules. *PacTel Cellular*, 8 FCC Rcd 742 (1993).

2. The Commission and PacTel have reached an agreement which would terminate the Commission's NAL proceeding. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference. In this regard, we conclude that, based on the facts before us, even if the allegations were true, we find no substantial and material questions of fact regarding PacTel's basic qualifications to be a licensee. The Consent Decree does not affect the potential relevance of these facts to PacTel's renewal expectancy. *See* Consent Decree, para. 10.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED and that the Secretary shall sign such Consent Decree on behalf of the Commission.

5. IT IS FURTHER ORDERED that the Commission's Notice of Apparent Liability initiated February 2, 1993, IS RESCINDED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Federal Communications Commission ("Commission") and PacTel Cellular ("PacTel").

2. Under the terms of this Consent Decree, PacTel agrees to make a voluntary payment totalling $34,000 for deposit into the United States Treasury, and the Commission agrees to terminate its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. On February 6, 1991, the Mobile Services Division (MSD) granted developmental authorization to PacTel to conduct field tests using experimental radio equipment operating on cellular frequency Block B. The authorization was for a period of one year, expiring on February 6, 1992. PacTel's developmental authorization required PacTel to file a report with the Commission containing the information required by Section 22.406(a) of the Commission's Rules at the close of the developmental period. PacTel filed the required report on June 10, 1992.

4. On July 20, 1992, PacTel submitted a request for Special Temporary Authority (STA) to continue tests which were initiated under the previously granted and expired developmental authorization. In its STA request, PacTel indicated that it had continued testing after the February 6, 1992 expiration of its developmental authorization. On July 21, 1992, PacTel filed an application for developmental authority to continue testing, and the MSD granted PacTel a one-year developmental authorization on July 27, 1992.

5. On July 28, 1992, the MSD set aside its July 27th action granting the one-year developmental application. The MSD requested that PacTel provide the Commission

with details of the circumstances surrounding the unauthorized continuing developmental testing, as well as the steps PacTel would take to prevent a recurrence.

6. By letter dated August 3, 1992, PacTel explained that the individuals responsible for conducting the tests did not terminate testing despite being notified by other PacTel employees of the expiration of the developmental authorization. Those responsible individuals also did not advise other PacTel employees that the tests were continuing. In addition, the program coordinator for PacTel's test project had left the employ of PacTel in June 1992. PacTel stated that it had instituted two procedures to prevent a recurrence of unauthorized testing. First, PacTel put in place procedures that would provide PacTel management with more advance notice when a developmental authorization nears expiration in order to take appropriate action. Second, the individuals responsible for testing were instructed not to test equipment without an effective developmental authorization from the Commission.

7. As a result of PacTel's August 3rd response, the MSD on August 4 granted PacTel a one-year developmental authorization through August 3, 1993. In addition, on February 2, 1993, the Commission released a Notice of Apparent Liability (NAL) for Forfeiture against PacTel. *PacTel Cellular*, 8 FCC Rcd 742 (1993). The NAL found that PacTel's actions apparently violated Section 301 of the Communications Act and Sections 22.3 and 22.406(a) of the Commission's Rules. The NAL set forth a forfeiture in the amount of $34,000. On July 7, 1993, the MSD granted PacTel an additional one-year developmental authorization through August 3, 1994.

III. DEFINITIONS

8. For the purposes of this Decree, the following definitions apply:

(a) "PacTel" means PacTel Cellular or any of its successors in interest.

(b) "Order" means an order of the Commission adopting the terms and conditions of this Decree.

(c) "Final Order" means an Order of the Commission that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

IV. AGREEMENT

9. PacTel admits the jurisdiction of the Commission over it, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree.

10. PacTel waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. PacTel agrees that upon signing by PacTel and the Commission, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

11. This Decree is for purposes of settlement only, and its signing does not constitute an admission by PacTel of any violation of law, rules, or policy.

12. In consideration for the Commission's agreement to terminate the NAL proceeding in accordance with the terms of this Decree, PacTel hereby agrees to the following terms, conditions, and procedures, which the parties believe will facilitate a fair and expeditious resolution of the NAL proceeding in a manner that would serve the public interest:

(a) PacTel will make a voluntary payment to the United States Treasury, without further protest or recourse, in the amount of $34,000, within five days after the Order adopting this Decree is released. Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

(b) PacTel agrees that the contribution of $34,000 to the United States Treasury may not be claimed as a tax deduction.

(c) The failure of PacTel to comply with these terms will be considered a failure of compliance with this Decree.

13. In light of the covenants and representations contained in this Decree, and in express reliance thereon, and in order to conserve Commission resources and avoid litigation costs, the Commission agrees to terminate its Notice of Apparent Liability proceeding against PacTel. Such termination is without a finding by the Commission of wrongdoing by PacTel. Further, the Commission agrees that it will not institute, on its own motion, any proceedings against PacTel based upon the information obtained during the investigation up to the date of this Consent Decree. In addition, in the absence of additional facts, the Commission agrees that the allegations and other circumstances involved in this proceeding will not be used against PacTel with respect to its basic qualifications to be a licensee in any current or future proceeding.

14. PacTel agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

15. The parties further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the NAL proceeding, issuance of an Order as described herein, and PacTel's compliance with the terms, conditions, and procedures set forth in paragraph 12. If this Decree is not signed by the Commission and PacTel, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

16. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, PacTel agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION

By:_____
William F. Caton, Acting Secretary

PACTEL CELLULAR

By:_____

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sprint Communications Company, L.P. Tariff F.C.C. No. 10 — Transmittal No. 87

ORDER

Adopted: June 22, 1994; Released: June 22, 1994

By the Chief(Acting), Tariff Division, Common Carrier Bureau:

1. The captioned transmittal modifies an existing promotional rate discount, "Most Plus," offered in Guam by Sprint Communications Company, L.P. (Sprint). IT&E Overseas, Inc. (IT&E) submitted a petition to suspend and investigate Transmittal No. 87, and Sprint replied. Transmittal No. 87 is scheduled to become effective June 23, 1994.

2. As originally tariffed, effective January 7, 1994, Sprint's Most Plus offering provided subscribers a 50 percent rate discount for two monthly billing periods, for the number they called the most. The pending transmittal extends the discount from June 23 through December 31, 1994, for both new and existing customers.[1]

3. IT&E asserts that advertisements for the Most Plus promotion distributed in Guam during May and June 1994 did not include the two-month discount limitation, but instead stated that subscribers would receive the discount through the end of 1994. IT&E states that when the discrepancy between the tariff and Sprint advertising was brought to the attention of the Office of the Attorney General of Guam, Sprint filed the captioned transmittal deleting the two-month limitation, although an advertisement on June 13, 1994 referred to it. IT&E Petition at 2-3.

4. IT&E contends that as Section 203(c)(3) of the Communications Act, 47 U.S.C. § 203(c)(3), prohibits common carriers from extending to any person rate privileges not specified by tariff, Sprint's offering of a longer discount period than specified in the tariff, if confirmed, would make its tariff unlawful.[2] Alternatively, IT&E asserts that if the tariff terms were followed, the inconsistent advertisements were misleading and harmed competition more substantially than any public injury caused by making the program unavailable. Finally, IT&E avers that Sprint should not be allowed to file Transmittal No. 87, which offers the discount for the most-called number beginning January 7, 1994, without giving subscribers the rate discount retroactively to that date, lest the public and Sprint's competitors suffer irreparable injury. IT&E Petition at 3-4.

5. Sprint replies that IT&E's contentions regarding Sprint's past noncompliance with its tariff have nothing to do with the lawfulness of the revisions proposed in Transmittal No. 87, and that contentions of misleading advertising are similarly irrelevant to proposed tariff language. Sprint adds that IT&E claims that confusion generated by the advertisements harmed competition are not supported by any data to demonstrate competitive harm. Sprint Opposition at 2-4. Finally, Sprint states, assertions by IT&E that the tariff is not "valid" because it did not confer the discounted rate on customers since January 7, 1994 have nothing to do with whether the revisions at issue violate the Communications Act.

6. We have reviewed Sprint Transmittal No. 87, the IT&E Petition, and Sprint's Reply, as well as the clarified tariff language submitted by Sprint with its Application No. 18. We conclude that the petition does not demonstrate that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to suspend and investigate Sprint Communications Company, L.P. Transmittal No. 87, filed by IT&E Overseas, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Clarifying and corrective language revisions to Transmittal No. 87 were filed by Sprint under Transmittal No. 89 on June 21, 1994.

[2] IT&E refers to Section 204(c)(3), but the Communications Act contains no such sub-section and context makes it clear that IT&E intended to invoke Section 203(c)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier Switched
Local Transport
Restructure Tariffs

ORDER

Adopted: June 22, 1994; Released: June 23, 1994

By the Deputy Chief (Policy), Common Carrier Bureau:

1. In the *Transport Order,* the Commission adopted rules governing the rate structure for transport services.[1] That Order required local exchange carriers (LECs) to offer transport from a serving wire center (SWC) to an end office on dedicated facilities, without switching at a tandem switch. Besides this "direct trunked transport," the *Transport Order* also required LECs to offer transport from the SWC to the end office that includes switching at a tandem switch, called "tandem-switched transport." In the *First Transport Reconsideration Order,* the Commission stated that LECs were required to offer a third transport option: direct trunked transport billed at a flat monthly rate between SWCs and the access tandem; and tandem switched transport billed at a usage-sensitive rate between the access tandem and end office.[2] On September 1, 1994, the LECs filed tariffs to comply with both Orders.

2. On December 29, 1993, the Common Carrier Bureau (Bureau) released the *Transport Tariff Order,* permitting the LECs' local transport restructure tariffs to take effect.[3] In that Order, the Bureau interpreted the *First Transport Reconsideration Order* to require the LECs to offer, simultaneously, tandem switched transport from the SWC to end offices, as well as direct trunked transport between SWCs and the access tandem and tandem switched transport between the access tandem and end office.[4] The Bureau also granted LECs a short-termed waiver of the requirement to offer both transport options simultaneously to allow LECs time to make any needed modifications to their billings systems.[5] That waiver expires July 1, 1994.

3. There are now pending before the Commission petitions for clarification or waiver of the requirement to provide direct trunked transport between SWCs and the access tandem and tandem switched transport between the SWCs and the access tandem simultaneously.[6] Given the complexities of the issues raised by these petitions, the Bureau does not anticipate ruling on them before July 1, when the existing waivers are scheduled to expire. Therefore, on our own motion, we extend the waivers at issue here until we act on the pending petitions for clarification.

4. Accordingly, IT IS ORDERED that the requirement that local exchange carriers offer both direct trunked and tandem switched transport between a specific serving wire center and an access tandem pursuant to Transport Rate Structure and Pricing, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370, 5371-72 (1993) IS WAIVED, until further notice.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[1] Transport Rate Structure and Pricing, 7 FCC Rcd 7006 (1992) (*Transport Order); recon.* 8 FCC Rcd 5370 (1993) (*First Transport Reconsideration Order); further recon.* 8 FCC Rcd 6233 (1993) (*Second Transport Reconsideration Order), further recon. pending.*

[2] *First Transport Reconsideration Order,* 8 FCC Rcd at 5372 (para. 9). *See* Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111, 69.112; *Transport Order,* 7 FCC Rcd at 7009 n.7, and 7077, Diagram 3.

[3] Local Exchange Carrier Switched Local Transport Restructure Tariffs, 9 FCC Rcd 400 (Com. Car. Bur. 1993) (*Transport Tariff Order).*

[4] *Id.* at 422 (para. 59).

[5] *Id.*

[6] Nine LECs filed a joint petition for clarification or waiver. Those LECs are Southwestern Bell Telephone Company; Ameritech Operating Companies; Bell Atlantic Telephone Companies; Cincinnati Bell Telephone Company; Lincoln Telephone and Telegraph Co.; Lufkin-Conroe Telephone Exchange, Inc.; NYNEX Telephone Companies; Pacific Bell and Nevada Bell; and Southern New England Telephone Company. BellSouth Telecommunications, Inc. filed a separate petition seeking waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Maine Telecommunications Group, Inc.

WFT Acquisition Company

MCTA, Inc.

Petitions for Waiver
of Section 61.41(c)
of the Commission's Rules

ORDER

Adopted: June 8, 1994; Released: June 8, 1994

By the Acting Chief, Tariff Division:

I. INTRODUCTION

1. On January 27, 1994, Maine Telecommunications Groups, Inc. (Maine Telecommunications), WFT Acquisition Company (WFT), and MCTA, Inc. (MCTA) jointly filed a petition for waiver (Joint Petition) of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c). Petitioners[1] intend to acquire numerous access lines in the states of Maine, Vermont and New Hampshire from GTE Telephone Operating Companies (GTE) -- a telephone company subject to price cap regulation. The rules at issue require companies subject to rate of return regulation, such as petitioners, to become price cap companies and exit the National Exchange Carrier Association, Inc. (NECA) common line and traffic sensitive pools when they acquire a price cap company. Petitioners request waivers because they want to remain under rate of return regulation and continue as members of the NECA pools.

II. SUMMARY OF PLEADINGS

2. Maine Telecommunications will purchase all the stock of GTE subsidiary Contel of Maine, Inc., encompassing approximately 46,000 access lines. WFT will purchase stock of GTE subsidiary Contel of Vermont representing 35,000 access lines. MCTA will buy 9600 access lines from GTE subsidiary Contel of New Hampshire.[2] Petitioners maintain that as small telephone companies they are not subject to price cap regulation.[3] Petitioners further contend that allowing them to remain in the NECA pools will enable them to continue to benefit from the administrative efficiencies of participating in nationwide tariffs, which in turn will allow them to offer more reasonable rates to their customers.[4] Finally, petitioners assert that they lack any motive or opportunity to shift costs between price cap and rate of return affiliates or to "game" the price cap system.[5]

3. The National Telephone Cooperative Association (NTCA) supports grant of petitioners' waiver requests, contending that the proposed transactions will not result in an increase in the Universal Service Fund (USF).[6] NTCA further maintains that petitioners are legitimate telephone companies proposing valid service expansions, and none of the petitioners is a spinoff of GTE or a creation designed to capture USF funds.[7] NTCA concludes that, as small telephone companies, petitioners have no opportunity to game the system and should be granted the requested waivers.[8] The United States Telephone Association (USTA) also supports petitioners' waiver requests, arguing that the proposed acquisitions do not raise any concerns regarding gaming the price cap system because petitioners' telephone company affiliates are all rate of return companies and because none of the petitioners has any affiliation with GTE.[9]

4. The National Exchange Carrier Association, Inc. (NECA) also supports petitioners' waiver requests, asserting that petitioners' proposals do not evidence any attempt to shift costs among affiliates because GTE and petitioners are not affiliated.[10] GTE will remain under price caps after completion of the proposed transactions, explains NECA, but will not retain any ability to assert control over the exchanges that become subject to rate of return regulation when it sells them to petitioners.[11] Lastly, NTCA, USTA and NECA all support allowing petitioners to remain in the NECA pool so that the benefits of its administrative efficiencies may be passed on by petitioners to their customers.[12]

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[1] Maine Telecommunications is a wholly owned subsidiary of Lincolnville Telephone Company (Lincolnville), which operates approximately 1470 lines in Maine. WFT is an indirect subsidiary of Selectronics Corporation (Selectronics), which is an affiliate of Waitsfield-Fayston Telephone Company (Waitsfield-Fayston). Waitsfield-Fayston has approximately 3575 access lines in Vermont. MCTA's affiliate, Merrimack County Telephone Company, operates approximately 6100 access lines in New Hampshire. Joint Petition at 1 n.1.

[2] Petitioners each aver that they do not plan to consolidate the access lines proposed to be purchased with those of their existing affiliates.

[3] Joint Petition at 4-6.

[4] *Id.* at 6-7.

[5] *Id.* at 8-9.

[6] NTCA Comments at 2 (filed Mar. 7, 1994).

[7] NTCA Comments at 2, n.1, *citing* US West Communications and Gila River Telecommunications, Inc., 7 FCC Rcd 2162 (Com. Car. Bur. 1992).

[8] *Id.*.

[9] USTA Comments at 2 (filed Mar. 7, 1994).

[10] NECA Comments at 2-3 (filed March 7, 1994).

[11] NECA Comments at 3, *citing* The Island Telephone Company, *et al.*, 7 FCC Rcd 6382 (Com. Car. Bur. 1992); US West Communications, Inc. and Emery Telephone, 8 FCC Rcd 4449 (Com. Car. Bur. 1993).

[12] NTCA Comments at 3; USTA Comments at 3; NECA Comments at 3.

III. DISCUSSION

5. Section 61.41(c)(2) of the Commission's rules, referred to as the "all-or-nothing" rule, provides that when a rate of return company and a price cap company merge, or one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[13] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, without such a rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more, by reason of its greater revenue requirement, while generating greater earnings for the price cap affiliate (that is, without triggering the sharing mechanism). Second, if a carrier were allowed to switch back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price cap regulation again, and reducing its costs to an efficient level.[14]

6. We conclude that there is good cause to grant petitioners waivers of Section 61.41(c) of the Commission's rules. The first concern the Commission identified in adopting these rules -- cost-shifting among affiliates -- is not at issue here. Petitioners do not seek to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a venue for "gaming" the price cap system -- is also not raised by the facts here. Except for exchanges it has sold, GTE remains regulated under price caps: it retains no ability to bring any exchange it has sold back under price caps.

7. Furthermore, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[15] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that is based largely on the historical performance of the eight largest -- namely, the Regional Bell Operating Companies and GTE.[16] The Commission therefore made price cap regulation optional for carriers below the eight largest ones. That being so, we must take into account the Commission's concerns with respect to subjecting small carriers to price cap regulation in applying the all-or-nothing rule here. For the reasons discussed above, we therefore grant petitioners waivers of Section 61.41(c) of the rules.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Section 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Petition of Maine Telecommunications Group, Inc., WFT Acquisition Co., and MCTA, Inc., for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

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[13] Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. § 61.41(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2367 (1991) (*LEC Price Cap Reconsideration Order*).

[14] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

[15] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[16] *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7665 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7842 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ace Communications NAL/Acct. 415HF0010
Fishers, Indiana

NOTICE OF APPARENT LIABILITY

Adopted: June 22, 1994; Released: June 30, 1994

By the Acting Chief, Enforcement Division, Field Operations Bureau

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (Act), 47 U.S.C. Section 503(b), to Ace Communications for the willful violation of Section 302(b) of the Act, 47 U.S.C. Section 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. Section 2.803.

2. The appropriate amount of forfeiture for this violation is $20,000.

II. BACKGROUND

3. Scanning receivers, or "scanners", are radio receivers that can automatically switch between four or more frequencies anywhere within the 30-960 MHz band. In order to control their potential to cause harmful interference to authorized radio communications, the FCC rules require that scanners receive an equipment authorization (certification) from the Commission prior to marketing. 47 C.F.R. Section 15.101. Marketing includes selling, advertising, shipping, importing and distributing.

4. Ace Communications marketed two types of scanner receivers (Yupiteru Model MVT 7100 and Trident Model TR 2400) which did not have an FCC equipment authorization. For the Yupiteru Model MVT 7100 scanner receiver, Ace Communications

- advertised it in these magazines: Amateur Radio Today, September 1993 edition; CQ, September 1993 edition; and Popular Communications, October 1993 edition.

- sold a scanner receiver to an individual on August 4, 1993.

For the Trident Model TR 2400 Ace Communications

- sold a scanner receiver to a company on March 16, 1994, and to an individual on April 25, 1994.

III. DISCUSSION AND CONCLUSION

5. Contrary to the requirements of Section 15.101(a) and 15.121 of the Commission's Rules, 47 C.F.R. Sections 15.101(a), 15.121, Ace Communications willfully marketed two types of scanner receivers which did not have an FCC equipment authorization. The marketing of these scanner receivers constituted two separate violations of Section 2.803 of the rules.

6. For marketing the Yupiteru Model MVT 7100 Scanner receiver, the Commission is assessing a $7,000 forfeiture. This is the base amount established by the Commission for this type violation.

7. For marketing the Trident Model TR 2400 Scanner receiver, the Commission is assessing a $13,000 forfeiture. As noted above, the base forfeiture for marketing unauthorized equipment is $7,000. However, we are making an upward adjustment of the base amount because this violation was repeated. Ace Communications marketed the Trident scanner receiver even after receiving the FCC's September 24, 1993, letter warning that such scanning receivers could not be marketed without first obtaining an FCC equipment authorization. Additionally, the FCC's December 8, 1993, letter warned Ace Communications that the FCC no longer grants equipment authorizations to scanner receivers that tune into the cellular telephone frequencies, and marketing of devices without an FCC equipment authorization is prohibited. Both the Trident scanner receiver and the Yupiteru scanner receiver tune into the cellular telephone frequencies. Scanning Receivers with such capability are not eligible for an equipment authorization pursuant to Section 15.121 of the Rules adopted in the *Amendment of Parts 2 and 15 to Prohibit Marketing of Radio Scanners Capable of Intercepting Cellular Telephone Conversations*, 8 FCC Rcd 2911 (1993).

8. We are also making an upward adjustment of the base amount because the violation was intentional. The Trident Model TR 2400 scanner receivers bear a label with FCC Identifier G70TR2400. This misleads others into believing that the FCC issued an equipment authorization for the scanner receiver. This is not the case. The FCC has not validated the FCC identifier by a grant of an equipment authorization, and the FCC identifier should not be used. Thus Ace Communications' marketing of the scanner receivers with an unvalidated FCC identifier is an intentional violation.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. Section 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. Section 1.80(f), that Ace Communications IS APPARENTLY LIABLE FOR MONETARY FORFEITURE in the amount of twenty thousand dollars ($20,000) for marketing unauthorized equipment in violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. Section 1.80(f)(3), that Ace Communications shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and

supporting documentation.[1] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The NAL/Acct. No. 415HF0010 should be written on the check or other instrument of authorization. Mail the payment to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses within 30 days regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Chief, Legal Branch
Mail Stop 1500E3 attn. 415HF0010
Washington, D.C. 20554

11. IT IS FURTHER ORDERED that the Field Operations Bureau send by certified mail, return receipt requested, one copy of this Order to Ace Communications.

FEDERAL COMMUNICATIONS COMMISSION

Roy E. Kolly
Acting Chief, Enforcement Division
Field Operations Bureau

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Blackship Computer Systems San Jose, California — NAL/Acct. No. 315SF0027

ORDER

Adopted: June 22, 1994; Released: June 30, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Blackship Computer Systems (Blackship) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $5,600 issued pursuant to Section 503(b), 47 U.S.C. §503(b), for violation of Section 302 of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §302, and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On December 31, 1992, the Los Angeles Field Office issued a Notice of Apparent Liability (NAL) to Blackship. The penalty was imposed for exhibiting a desktop computer which was not certified by the Commission. Based on the response from Blackship, the Los Angeles Field Office issued a Notice of Forfeiture (NOF) for $5,600 on March 9, 1993. Blackship now appeals. The petitioner, by letter dated April 8, 1993, requested further review of its case, but made no new arguments.

III. DISCUSSION AND CONCLUSION

3. We find that, upon review of the NAL and NOF and based upon petitioner failing to present any arguments or evidence that was not previously addressed, we must affirm the forfeiture amount.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the Petition for Reconsideration is DENIED.

5. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules, 47 C.F.R. §1.80, Blackship Computer Systems, Inc. must pay the forfeiture amount of five thousand and six hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315SF0027 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Blackship Computer Systems.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY	File No. ENF-93-02 NAL/Acct. No. 316EF0001

ORDER

Adopted: June 13, 1994; Released: June 30, 1994

By the Commission (Commissioners Ness and Chong not participating):

1. On August 27, 1993, the Commission issued a Notice of Apparent Liability for Forfeiture (NAL) to the American Telephone & Telegraph Company (AT&T).[1] In the NAL, the Commission found that AT&T had apparently violated rules and orders adopted by the Commission in its Third Computer Inquiry[2] by offering enhanced services and abbreviated dialing access to its enhanced services from its new Stand-Alone Public Enhanced Communications System (SPECS) public telephones without complying with the *Computer III* requirements or obtaining the required Commission waivers. The Commission also determined, based on a review of the facts and circumstances surrounding the violations, that AT&T was apparently liable for a forfeiture in the amount of $464,000.

2. The Commission has reached an agreement with AT&T that would resolve this proceeding, the terms and conditions of which are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this proceeding. We believe that the public interest would be served by adopting the Consent Decree, the terms of which are hereby incorporated by reference.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Consent Decree, incorporated by reference herein, IS HEREBY ADOPTED.

5. IT IS FURTHER ORDERED that the Acting Secretary SHALL SIGN the Consent Decree on behalf of the Federal Communications Commission.

6. IT IS FURTHER ORDERED that the above-captioned enforcement proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONSENT DECREE

1. On August 27, 1993, the Commission issued a Notice of Apparent Liability for Forfeiture (NAL) to the American Telephone & Telegraph Company (AT&T).[1] In the NAL, the Commission found that AT&T had apparently violated rules and orders adopted by the Commission in its Third Computer Inquiry[2] by offering enhanced services and abbreviated dialing access to its enhanced services from its new Stand-Alone Public Enhanced Communications System (SPECS) public telephones without complying with the *Computer III* requirements or obtaining the required Commission waivers. The Commission also determined, based on a review of the facts and circumstances surrounding the violations, that AT&T was apparently liable for a forfeiture in the amount of $464,000.

2. For the purposes of this Consent Decree, the following definitions apply:

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[1] American Tel. & Tel. Co., 8 FCC Rcd 6804 (1993).

[2] Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Third Computer Inquiry) (hereinafter *Computer III*), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase I Order*, *Phase I Reconsideration Order*, and *Phase II Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). The *Computer III* requirements governing AT&T's provision of enhanced services were not challenged before the Court of Appeals in *California v. FCC*, and the Commission has reinstated the *Computer III* decisions that allow AT&T to provide enhanced services on an integrated basis subject to nonstructural safeguards. *See* Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (*Computer III Remand*).

[1] American Tel. & Tel. Co., 8 FCC Rcd 6804 (1993).

[2] Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Third Computer Inquiry) (hereinafter *Computer III*), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase I Order*, *Phase I Reconsideration Order*, and *Phase II Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). The *Computer III* requirements governing AT&T's provision of enhanced services were not challenged before the Court of Appeals in *California v. FCC*, and the Commission has reinstated the *Computer III* decisions that allow AT&T to provide enhanced services on an integrated basis subject to nonstructural safeguards. *See* Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (*Computer III Remand*).

(a) "Commission" means the Federal Communications Commission;

(b) "AT&T" means the American Telephone & Telegraph Company, or any other affiliated entity, subsidiary, or successor controlled directly or indirectly by AT&T;

(c) "Order" means the order of the Commission adopting the terms and conditions of this Consent Decree and formally disposing of the above-captioned proceeding;

(d) "Effective date of this Consent Decree" is the date that the Order adopting the terms and conditions of this Consent Decree is released.

3. AT&T admits the jurisdiction of the Commission over it and over the subject matter of this proceeding for the purposes of this Consent Decree and any Order.

4. AT&T does not admit and specifically denies any and all liability for the actions that formed the basis of the NAL.

5. AT&T agrees that upon its signing and the signing of the Commission, the provisions of this Consent Decree shall be incorporated by reference in any Order, as described in paragraphs 2(c) above and 8 through 11 below, formally adopting this Consent Decree and terminating the proceeding.

6. AT&T waives any rights it may have to seek judicial review or otherwise challenge or contest the validity of any Order, as described in paragraphs 2(c) above and 8 through 11 below.

7. In consideration for the termination of this proceeding in accordance with the terms of this Consent Decree, AT&T agrees to make a non-tax deductible, voluntary contribution to the United States Treasury, without further protest, or recourse to a trial *de novo,* in the amount of $464,000 (four hundred sixty-four thousand dollars) within 5 days of the date on which the Order is released.[3] AT&T agrees to make such payment without admitting any of the alleged violations set forth in the NAL or admitting any other violations of the Communications Act or Commission rules or policy.

8. In light of the covenants and representations contained in paragraphs 3 and 5-7 of this Consent Decree, and in express reliance thereon, the Commission agrees that execution of this Consent Decree shall serve to resolve all issues arising from allegations of violations of Commission rules and orders by AT&T that are the subject of the NAL. If this Consent Decree is adopted by Order of the Commission, such adoption shall constitute a decision to terminate this forfeiture proceeding without any finding of violation or liability on the part of AT&T. The Commission agrees, in addition, that, in the absence of additional facts, it will not on its own motion institute against AT&T new proceedings of any kind arising out of conduct on which the NAL was based.

9. AT&T agrees that any violation of the Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

10. AT&T and the Commission further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of this forfeiture proceeding, issuance of an Order as described herein, and AT&T's compliance with the terms and conditions in paragraphs 3, 5-7, 9 and 11. If the Consent Decree is not signed by both parties, is not adopted by the Commission, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and shall not become part of the record in this forfeiture proceeding nor may it be used in any fashion by any party in a legal proceeding.

11. If the Commission brings an action in United States District Court to enforce the terms of the Order, AT&T agrees that it will not contest the validity of the Order, will waive its statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

For: American Telephone and Telegraph Company (AT&T)	For: Federal Communications Commission
/s/ E. E. Estey Regulatory Vice President	/s/ William F. Caton Acting Secretary
October 29, 1993 Date	June 17, 1994 Date

[3] This amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on the check or money order to "NAL/Acct. No. 316EF0001". Such remittance should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
MCI INTERNATIONAL, INC.
WORLD COMMUNICATIONS, INC.

Application for authority to deactivate and retire the TAT-6 Cable System.

File No. I-T-D-94-008

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
TRT/FTC COMMUNICATIONS, INC.
MCI INTERNATIONAL, INC.
WORLD COMMUNICATIONS, INC.

Application for authority to deactivate and retire the TAT-7 Cable System.

File No. I-T-D-94-009

ORDER AND AUTHORIZATION

Adopted: June 15, 1994; **Released: June 30, 1994**

By the Chief, International Facilities Division:

1. The above-captioned uncontested applications, filed on April 12, 1994, by American Telephone and Telegraph Company (AT&T), MCI International, Inc. (MCII), and World Communications, Inc. (Worldcom), and AT&T, MCII, Worldcom, and TRT/FTC Communications, Inc. (TRT/FTC), respectively, (collectively the Applicants) request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue service via the TAT-6 and TAT-7 Cable Systems. The applications were placed on public notice on April 20, 1994. No comments were received.

2. The TAT-6 cable system (TAT-6) extends between terminals in Green Hill, Rhode Island and St. Hilaire de Reiz, France. TAT-6 was placed in operation on July 27, 1976, with an initial capacity of 4000 voice-grade circuits. The capacity was increased to 4229 circuits in 1986. TAT-6 is an SG type, analog, single, submarine, armorless cable composed of two-way rigid transistorized repeaters. The applicants state that because of increasing demand for digital facilities, demand has been steadily decreasing and the cable will soon become non-revenue producing and too costly for restoration and maintenance. The applicants also state that all users of the cable have been notified of the expected deactivation of the cable and none has expressed any objection to such deactivation.

3. The TAT-7 cable system (TAT-7) extends between terminals in Tuckerton, New Jersey and Lands End, England. TAT-7 was placed in service on July 1, 1983, with an initial capacity of 4200 voice-grade circuits. The capacity was increased to 4246 circuits in 1985. TAT-7 is the same type of cable as TAT-6. The Applicants state the same reasons for deactivation of TAT-7 as for TAT-6, and state further that no objection has been received from any user of this cable.

4. Upon review of the applications, we find that the TAT-6 and TAT-7 cable systems have reached the end of their useful service life. The applicants understand that each user has made arrangements to transfer service to other facilities. Thus, there will be no impairment of service to any community or part of a community formerly served via the TAT-6 or TAT-7 cable systems as a result of their retirement.

5. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the applicants of the TAT-6 and TAT-7 cable systems.

6. Within 60 days of the release of this Order, the Applicants shall notify the Commission of the accounting treatment they intend to use in retiring the TAT-6 and TAT-7 cables systems.

7. Upon discontinuance of use and operation of the TAT-6 and TAT-7 cable systems, the Applicants shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing licenses they possess covering the TAT-6 and TAT-7 cables systems.

8. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6508
Tariff F.C.C. No. 2

ORDER

Adopted: June 16, 1994; Released: June 17, 1994

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On February 17, 1994, AT&T Communications (AT&T) filed the captioned tariff revision on 14 days' notice. This filing establishes that AT&T Customer Specific Term Plan II customers seeking to upgrade to a new, higher commitment term plan must either satisfy the pro-rated annual commitment of the CSTP II plan being terminated or else must pay the difference between their actual billed net usage revenue and the pro-rated annual commitment. The amended transmittal is currently scheduled to take effect on June 17, 1994.[1]

2. On February 23, 1994, GE Capital Communication Services Corporation, Public Service Enterprises of Pennsylvania, Inc., and The Furst Group, Inc. filed a petition to reject or suspend and investigate Transmittal No. 6508. On the same date, Winback and Conserve Program, Inc. filed a petition to reject Transmittal 6508. AT&T filed a reply on February 28, 1994.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6508 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 6508, filed by GE Capital Communication Services Corporation, Public Service Enterprises of Pennsylvania, Inc., and The Furst Group, Inc. ARE DENIED.

5. IT IS FURTHER ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 6508, filed by Winback and Conserve Program, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

[1] On June 14, 1994, AT&T filed amended Application No. 1871 to clarify the conditions under which a refund of the shortfall payment will occur. AT&T's application was granted under Special Permission No. 94-709.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 17, 1994

Released: June 21, 1994

Chronicle Publishing Company
c/o Ms. Alane C. Weixel
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

Dear Ms. Weixel:

This letter is in response to your May 16, 1994 inquiry seeking clarification and waiver of Section 76.922(d)(3)(iii) of the Commission's rules as applied to the July 1, 1994 launch of Bay-TV, a regional news and information channel for the San Francisco Bay area. You state that July 1, 1994 was established as the launch date for Bay-TV during retransmission consent negotiations prior to the Commission's release of its new rate regulations, and that Chronicle has incurred considerable expense in preparation of the launch, including the advance purchase of advertising time.

You note that we determined in letters concerning the launch of the fX channel that the substitution of that service for a pre-existing service, without a rate increase, prior to July 14, 1994 will not constitute a restructuring triggering refund liability under Section 76.922(b)(6)(B) of the Commission's rules, provided that introduction of the new service was previously planned, and that we limited that finding to the specific conditions described in that letter.[1] You state that, although July 1, 1994 is the previously planned date for launch of Bay-TV, some operators have recently expressed a desire to advance launch of the service to June 30, 1994. You thus inquire whether our finding concerning the fX channel may apply equally to those operators now planning to introduce Bay-TV on the earlier date.

We believe that the circumstances described in your letter are similar to those that formed the basis of our decision in the *fX Letters*. That is, we understand that you have expended considerable resources in preparation of the launch, and that retransmission consent negotiations leading to the carriage of Bay-TV were substantially completed by December 30, 1994. Similarly, we do not believe that extending our finding concerning the fX channel to operators recently deciding to advance introduction of Bay-TV to June 30, 1994 raises a serious risk of harm to consumers. Accordingly, we find that the substitution of Bay-TV prior to July 14, 1994, whether on June 30, 1994 or July 1, 1994, on a regulated tier during the deferral period will not trigger refund liability under Section 76.922 of our rules. We limit this determination to the circumstances described in your letter and in the *fX Letter*.

In addition, you note that, under Section 76.922(d)(3)(iii) of the Commission's rules, operators scheduled to introduce Bay-TV prior to July 14, 1994 will not be permitted to pass through to consumers the increased programming costs associated with the program service until October 1, 1994. You thus request a waiver similar to that granted by the Commission to fX in the above-referenced letter, so that operators carrying Bay-TV may recover fully the programming costs incurred as of the introduction of Bay-TV.

In our letter regarding fX, we concluded that, in fairness to fX, which had pre-existing commitments to launch between March 30, 1994 and July 14, 1994, operators should be permitted to recover the programming costs of such a new service that are incurred prior to July 1, 1994. We indicated our understanding, based on representations by FOX, that a program service, such as fX, already has expended considerable resources in preparing to launch its channel, and its decision clearly was made before our rules were announced. We thus permitted operators to include in their permitted rates the costs incurred as a result of carriage of fX prior to July 1, 1994.

We believe that the situation described in your letter is similar to that considered in the letter concerning the launch of fX. Accordingly, we will waive Section 76.922(d)(3)(iii) of our rules to permit operators to pass through the costs of Bay-TV during the third quarter. This decision is limited to the circumstances described in your letter and is subject to the same limitations set out in the letter regarding fX.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See In re fX Channel* (released April 20, 1994, Cable Services Bureau) and *In re fX Channel* (released April 22, 1994, Cable Services Bureau) (clarifying impact of 47 C.F.R. § 76.922 on the June 1, 1994 launch of the fX Channel).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nan Tan Computer Company
Taipei, Taiwan

NAL/Acct. No. 415HF0008

NOTICE OF APPARENT LIABILITY

Adopted: June 10, 1994; **Released: July 1, 1994**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 503(b), to Nan Tan Computer Company for the willful violation of Sections 2.931 and 15.109 of the Commission's rules, 47 C.F.R. §§ 2.931, 15.109, by marketing equipment, the equipment authorization for which had been voided by the making of unauthorized modifications, resulting in radiated emissions above permissible limits.

2. The appropriate amount of forfeiture for this violation is $7,000.

3. On October 1, 1993, the Commission's Office of Engineering and Technology laboratory (OET) received a sample of the lap top personal computer authorized for marketing in the United States under Equipment Authorization Code (FCC ID) FMA6500C from Clevo, Inc., a U. S. distributor for Nan Tan Computer Company. It was tested and found to have radiated emissions at 66.6 MHz with a field strength of 316 V/m measured at a distance of 3 meters. This is 10 dB over the maximum permissible level of 100 V/m at that distance. Examination of the test sample revealed that a shield plate on the bottom of the keyboard, present in the specifications for the equipment when marketing authorization was applied for, was missing.

II. DISCUSSION

4. Section 15.109(a) of the Commission's Rules specifies that the maximum permissible radiation of emissions between the frequencies of 30 and 88 MHz, measured at a distance of 3 meters, is 100 V/m. The measured level of emissions at 66.6 MHz was 316 V/m, 10 dB above the maximum permissible level.

5. Section 2.931 of the Commission's Rules specifies that all units of a product authorized for marketing under an equipment authorization must, except for certain changes authorized under Section 2.1001 of the Commission's Rules, be identical in all respects with the specifications contained in the application for equipment authorization. Failure to install a required shield plate is a non-permissive change that violates Section 2.931.

6. The violation was willful. Willful is defined as the conscious and deliberate commission or omission of an act that violates a Commission requirement. For a violation to be willful, it is not required that the violator also intend to violate a requirement of the Commission or be aware that it is committing a violation. 47 U.S.C. § 312(f)(1).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), (*1993 Policy Statement*), the base forfeiture amount for violation of the Commission's equipment marketing regulations is $7,000. Consistent with the discretion we expressly reserved in the *1993 Policy Statement*, the forfeiture is $7,000.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C., § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Nan Tan Computer Company IS APPARENTLY LIABLE FOR MONETARY FORFEITURE in the amount of seven thousand dollars ($7,000) for violating Section 302(b) of the Act and Sections 2.931 and 15.109 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Nan Tan Computer Company shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[1] Forfeitures shall be paid by check or money order payable in United States funds to the Federal Communications Commission. The NAL/Acct. No. 415HF0008 should be written on your check. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau, Enforcement Division
Stop Code 1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Be sure to include the NAL/Acct. No. 415HF0008 in any correspondence.

10. IT IS FURTHER ORDERED that Nan Tan Computer Company shall, upon receipt of this Notice, immediately cease marketing all equipment authorized under the

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

FCC equipment identifier FMA6500C until the equipment deficiencies described above are corrected. Nan Tan Computer Company is hereby PUT ON NOTICE that any marketing of equipment under above equipment authorization number prior to correcting the above noted deficiencies will violate Section 2.803 of the Commission's Rules and may make Nan Tan Computer Company liable for additional monetary forfeitures.

Nan Tan Computer Company is requested to notify the Commission when the deficiency cited in this document has been corrected. Send such notification to:

Federal Communications Commission

Office of Engineering and Technology

Sampling and Measurements Branch, Stop Code 1300B3

7435 Oakland Mills Road

Columbia, MD 21046

11. IT IS FURTHER ORDERED that this notice shall be sent by first class mail to Nan Tan Computer Company, and another copy by certified mail, return receipt requested, to Clevo, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Roy E. Kolly
Acting Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Signature Flight Support
Baltimore, Maryland

NAL/Acct. No. 315NY0012

ORDER

Adopted: June 17, 1994; **Released: July 1, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Signature Flight Support (petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $8,000 issued pursuant to Section 503(b) of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 503(b), for violation of Section 301 of the Act, 47 U.S.C. § 301. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On July 12, 1993, the Commission's New York Office issued a Notice of Apparent Liability (NAL) to the petitioner. The penalty was imposed for operating an unlicensed Aeronautical Advisory Station (UNICOM) on a frequency of 122.95 MHz. Based on the response from the petitioner, the New York Office issued a Notice of Forfeiture (NOF) for $8,000 on September 24, 1993. The petitioner now contends that it has had no experience with enforcement action in the past and requests a review of the forfeiture action.

III. DISCUSSION AND CONCLUSION

3. The petitioner raises no arguments in the request for review. Nevertheless, upon review of the NAL and NOF, we find that the forfeiture properly was assessed according to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, and, accordingly, we find that the petitioner did violate the Act and rules. However, because the petitioner has no prior record of violations, we will reduce accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that Signature Flight Support must pay the forfeiture amount of six thousand four hundred dollars (6,400) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315NY0012 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Signature Flight Support.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Robert V. Crow NAL/Acct. No. 315KI0072
Corpus Christi, Texas

ORDER

Adopted: June 17, 1994; Released: July 1, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Robert V. Crow (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued pursuant to Section 503(b) of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 503(b), for violation of Section 301 of the Act, 47 U.S.C. § 301. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On April 27, 1993, the Commission's Kingsville Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for willfully operating an aircraft radio station on April 4, 1993 on frequency 122.800 MHz without a license from the Commission. Based on the response from Petitioner, the Kingsville Office issued a Notice of Forfeiture (NOF) for $2,000 on May 25, 1993. Petitioner now appeals. The petitioner contends that there was no "willful intent" to operate the aircraft radio without a license.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. Petitioner contends that he had no "willful intent" to operate the aircraft radio station without a license. The NAL is based on Petitioner's willful, as opposed to intentional, use of the aircraft radio station without a license. Section 312(f)(1) of the Act, which also applies to Section 503(b) of the Act, provides that the term "willful," when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of the Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Petitioner does not claim that he did not consciously operate the aircraft radio station on April 4, 1993 on frequency 122.800 MHz. This conscious action constitutes a wilful action under the Act and rules. Accordingly, the forfeiture is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED that Robert V. Crow must pay the forfeiture amount of two thousand dollars ($2,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315KI0072 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Robert V. Crow.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David J. Laing NAL/Acct. No. 215FE0145
Bellingham, Washington

ORDER

Adopted: June 15, 1994; Released: July 1, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. David J. Laing (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $500 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301 of the Communications Act of 1934, as amended (the Act). For the reasons noted below, the Bureau is reducing the monetary forfeiture amount to $400.

II. BACKGROUND

2. On June 22, 1992, the Commission's Ferndale Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for operating on Marine Channel 16 (156.800 MHz) without the required Commission authorization. Based on Petitioner's response, the Ferndale Office issued a Notice of Forfeiture (NOF) for $500 on August 26, 1992. Petitioner timely appealed the Forfeiture Order. Petitioner does not contest the facts. He does, however, argue that any violation was unintentional, resulting from his ignorance of the law -- his assumption that the license which had been issued to the vessel's previous owner was still valid and valid as to his use of it.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Petitioner's response, which is hereby accepted as a Petition for Reconsideration, have been thoroughly considered and are incorporated herein by reference. Upon review of the arguments raised in the Petition as well as review of the NAL and NOF, we find that the Petitioner fails to present any new arguments or evidence that was not previously addressed. Although Petitioner has, throughout these proceedings, continued to claim that he is unable to pay the forfeiture, documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, have not been submitted to support this claim.

4. We note, however, that in accordance with the Commission's revised guidelines implementing the *Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993), the amount of the forfeiture for violations of this nature has been reduced. Accordingly, we have reduced the forfeiture amount from $500 to $400.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in part.

6. IT IS FURTHER ORDERED pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that David J. Laing must pay the forfeiture amount of four hundred dollars ($400) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215FE0145 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to David J. Laing and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Miss Shell Seafood Company
New Smyrna Beach, Florida

NAL/Acct. No. 315PS0016

ORDER

Adopted: June 15, 1994; Released: July 1, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Miss Shell Seafood Company filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued pursuant to Section 503, 47 U.S.C. Section 503, for violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. Section 301 (the Act). For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On April 29, 1993, the Powder Springs Office issued a Notice of Apparent Liability (NAL) to Miss Shell Seafood Company. The penalty was imposed for transmitting on an unauthorized frequency, (5450 kHz) in the aeronautical band. Based on the response from Paul Pickett, president of Miss Shell Seafood Company, the Powder Springs Office issued a Notice of Forfeiture (NOF) for $2,000 on June 23, 1993. Miss Shell Seafood Company now appeals. The petitioner contends that he has taken corrective action to see that the violation is not repeated and that a forfeiture would cause the company undue hardship.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the first paragraph of the licensee's Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the party has no record of previous violations and reduce the forfeiture amount accordingly. Although the petitioner claims a hardship to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in part.

5. IT IS FURTHER ORDERED pursuant to Section 1.80 of the reules, 47 C.F.R. § 1.80, that Miss Shell Seafood Company must pay the forfeiture amount of One Thousand Six Hundred Dollars ($1,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315PS0016 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Miss Shell Seafood Company.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rodney Lynn Murphy
Salem, Oregon

NAL/Acct. No. 415PO0001

ORDER

Adopted: June 15, 1994; **Released: July 1, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Rodney Lynn Murphy (Murphy) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $19,000 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 301 of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. Section 301, and Sections 95.409(a), 95.410(a), and 95.413(a)(2) of the Commission's Rules. 47 C.F.R. Sections 94.409(a), 95.410(a), 95.413(a)(2). For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On October 22, 1993, the Portland Office of the Field Operations Bureau issued a Notice of Apparent Liability (NAL) to Murphy. The penalty was imposed for transmitting radio signals on 26.825 MHz, a frequency for which he was not licensed, in violation of Section 301 of the Act; using a transmitter that was not FCC type-accepted, in violation of Section 95.409(a) of the rules; transmitting in excess of the 4 watts maximum power permitted, in violation of Section 95.410(a) of the rules; and transmitting obscene, indecent or profane language, in violation of Section 95.413(a)(2) of the rules. Based on the fact that there was no response from Murphy, the Portland Office issued a Notice of Forfeiture (NOF) for $19,000 on December 9, 1993. Murphy now appeals. The petitioner contends that he did not know the transmitter was not type accepted and he is financially unable to pay the forfeiture. However, he submits no financial documentation to support this claim.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in Murphy's Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed or that would warrant reduction or mitigation of the forfeiture. Failure to know the rules or appropriate equipment does not justify mitigation or cancellation. Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that Rodney Lynn Murphy must pay the forfeiture amount of nineteen thousand dollars ($19,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 415PO0001 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Rodney Lynn Murphy.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-108

In the Matter of

Amendment of Section 73.202(b), RM-6606
Table of Allotments,
FM Broadcast Stations.
(Sonora, California)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 10, 1994; Released: July 1, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration ("Petition") of the *Report and Order* (*"R&O"*) in the above-docketed proceeding, 6 FCC Rcd 6042 (1991), filed by Clarke Broadcasting Corporation ("Clarke"), successor to the H Group, Inc. as licensee of Station KZSQ(FM), Channel 224A (92.7 MHz), Sonora, California. The *R&O* denied the rule making proposal (RM-6606) filed by the H Group for an upgrade of Station KZSQ(FM) on Channel 224B1 at Sonora and modification of its license accordingly. An opposition to the Petition was filed by Clear Mountain Air Broadcasting Company and Clarke filed reply comments. Clarke subsequently filed a request for withdrawal of its Petition.[1] We will grant the Clarke's request.

2. IT IS ORDERED That the petition for reconsideration filed by Clarke Broadcasting Corporation is DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] In accordance with Section 1.420(j) of the Commission's Rules, Clarke included a statement that it has not received nor will it receive any consideration for the withdrawal of its Petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. FILE NO. BPH-890616MR

For construction permit for
new FM station, Channel 277A,
Lenoir, North Carolina

APPEARANCES

Steven Yelverton on behalf of Maria Ochoa; *Lawrence J. Bernard, Jr.* on behalf of *Foothills Broadcasting Inc.;* and *Gary Schonman* and *James Shook* on behalf of Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: June 23, 1994; Released: July 1, 1994

PRELIMINARY STATEMENT

1. On December 28, 1993, the Commission remanded this case for further hearing on Foothills Broadcasting Inc.'s application (BPH-890616MR). See FCC 93-526.[1] Acting on a series of motions to enlarge[2] that Maria Ochoa had filed against Foothills, the Commission found that some of Ochoa's allegations warranted further exploration and called for a remanded hearing on the following three factual issues.

(a) Whether Foothills Broadcasting, Inc. and/or Steve Frank attempted to deceive the Commission by representing, in an opposition pleading filed on June 30, 1993 and an attached affidavit and in the "Summary" filed on July 16, 1993 as an attachment to an opposition to a strike motion, that Mr. Frank had secured assurance of access to Foothills' proposed transmitter site by procuring a declaration of consent from Clyde Keyes;

(b) Whether Steve Frank and/or Foothills misrepresented in a pleading filed with the Commission on June 30, 1993, the duration of the interval between the communication of Hennessee's oral and written notices of refusal; and

(c) Whether Foothills lost reasonable assurance of access to its proposed transmitter site for more than 30 days and violated 47 CFR 1.65 by failing to report this.

2. The Commission also set out the ultimate conclusionary issue, along with a forfeiture issue:

(d) In light of the evidence adduced under the foregoing issues, whether Foothills is qualified to be a licensee; and

(e) In light of the evidence adduced under issues (a) and (b), whether a forfeiture penalty should be assessed against Foothills pursuant to 47 USC § 503, subsections (b)(1), (b)(2)(4), and (b) (3), 47 CFR § 1.80, subsections (b) and (g), and 47 CFR 1.229(f) for violation(s) of 47 CFR 1.17, in an amount of up to $25,000 for each violation.

3. We held the remanded prehearing conference on March 28, 1994, the remanded evidentiary admission session on April 7, 1994, and the remanded hearing on April 25-26, 1994. We closed the evidentiary record on April 26, 1994. See FCC 94M-309 released April 29, 1994.

4. Foothills and Ochoa filed their Proposed Findings of Fact and Conclusions of Law on June 10, 1994, and their Reply Findings on June 20, 1994.

FINDINGS OF FACT
INTRODUCTORY FINDINGS

5. The remanded conflict between Maria Ochoa and Foothills centers around three factual questions: (1) *When* did Steven Frank, Dr. Gerald Bolick and Arvil Greene take their joint trip up Warrior Mountain? (2) *When* did Arvil Greene's son-in-law, Allen Hennessee first inform Steven Frank that he would not permit Foothills to use the road (up Warrior Mountain) across his property? and (3) did Steven Frank misrepresent facts to the Commission when he told the Commission in his June 25, 1993 affidavit that he had secured access to the Bolick site from Clyde Keyes?

6. The situation is this: If events transpired as Ochoa's witnesses (Arvil Greene, his children, and his son-in-law) testified that they did, then Foothills did indeed make misrepresentations to and lacked candor with the Commission on remanded issues (a) - (c).

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[1] FCC 93-526 *supra*. also denied Maria Ochoa's petition for reconsideration of the Commission's affirmance of the Review Board's decision that she is disqualified for testifying deceitfully and that the competing application of Foothills Broadcasting Inc. should be granted. See *Maria M. Ochoa*, 8 FCC Rcd 3135 (1993). So although Maria Ochoa participated fully in this remanded proceeding, her application remains denied. Stated another way the only relief that Maria Ochoa could hope to obtain from this remanded proceeding would be to have Foothills Broadcasting Inc.'s application also denied.

[2] All of Ochoa's enlargement requests came after the Commission denied her Petition for Reconsideration May 10, 1993. See FCC 94M-114 released March 7, 1994 at Para. 10.

7. On the other hand, if events transpired as Foothills' witnesses contend, then nothing serious is really amiss, and the most that Steven Frank could be guilty of is *mistakenly* representing to the Commission that Clyde Keyes' property adjoined that of Dr. Gerald Bolick.

8. The Trial Judge has resolved the critical conflicts by crediting the testimony of the Foothills witnesses. However, this does not mean that Ochoa's witnesses have lied. But it does mean they are mistaken. Their mistakes are due to defective observations, false reminiscences, the detecting influence of suggestion, and the pleasure of imagination.

9. For example, Ochoa witness Arvil Greene claims that he, Steven Frank, and Dr. Gerald Bolick traveled to the top of Warrior Mountain *in 1989;* Foothills witness Steven Frank says the three of them made the trip in *1987.*

10. The Trial Judge has credited Foothills' version of events for three reasons. First, as between Frank and Greene, Frank's recall is probably closer to the truth than Arvil Greene's. Greene readily concedes that he has a poor memory, and admits that he adopted the 1989 date because his children and their spouses have suggested to him that the event occurred in 1989 (See Ochoa Ex. 4, pp.23-24). Secondly, the only other person who attended that meeting on the mountain was Dr. Bolick, and timewise Dr. Bolick's version of the Warrior Mountain trip is more in tune with Steve Frank's testimony than Arvil Greene's. Thirdly, the remanded contemporaneous documents that have been introduced into evidence blend in better with Frank's sworn testimony; e.g. Allen R. Hennessee's Declaration dated February 27, 1991, and Clyde Keyes' March 7, 1991 Declaration. See Foothills Ex. R-2, Ex.B - appendices 1 and 2.

11. Next, we turn to the conflict of testimony surrounding the duration of the interval between Allen Hennessee's oral and written notices of refusal. Hennessee says he first told Steven Frank that Foothills could not use the road traversing his land to access a radio tower back *in 1989.* Steven Frank says it was on or around *February 25, 1991.* Both sides agree that Hennessee formally refused access to his land by written declaration dated February 27, 1991.

12. Frank's testimony will be credited, and Hennessee's rejected. First of all, Hennessee's testimony on the matter is inherently inconsistent. On the one hand, he claims that there is approximately a two year interval between his oral (1989) and written (February 27, 1991) refusals. On the other hand, he claims that less than 60 days elapsed between his oral and written rejections (Foothills Ex. R-1, p.6).

13. In addition, and after analyzing his *entire* testimony, the finding is warranted that Allen Hennessee has a faulty memory. He claims to remember dates of events by relating them to other events. The problem with that is he gets the date of the other events wrong. He remembers observations that in truth never existed, but appear to be mere offsprings of his imagination. For example, Hennessee testified that his father-in-law, Arvil Greene *again* went up on Warrior mountain with Frank in 1993. But Greene was adamant that he only went up on the mountain with Frank once.

14. Another example: Hennessee swore that when Frank, Bolick, and Greene went up on the mountain, Greene's son Otis went up with them. However, Arvil Greene said there might have been one or more other people, but he didn't know who they were. And Bolick, a long-time neighbor of the Greene family didn't know who the other person at the mountain meeting was.

15. Conversely, Frank's version of the duration of the interval between Allen Hennessee's oral and written notices of refusal makes sense. In addition the contemporaneous documents; e.g. Hennessee's February 27, 1991 declaration harmonizes with Frank's recall.

16. So without imputing anything like willful and corrupt perjury to Ochoa's remand witnesses, the finding is warranted that their testimony on all the critical aspects of the remanded issues was mistaken, just plain wrong.

REMANDED ISSUES (a) - (c)

17. Foothills initiated the action to obtain an FM radio station in Lenoir, North Carolina in late 1987. On December 23, 1987, they petitioned the Commission to allot FM channel 277A to Lenoir. At that time Foothills' consulting engineer, William Culpepper sent Steven Frank, a Foothills officer, director, and stockholder, certain engineering materials, materials that would aid Foothills in locating a transmitter site that would comply with the Commission's rules. Culpepper indicated that Warrior Mountain, north of Lenoir, was one of three logical choices for a site.

18. Using Culpepper's materials and the Caldwell County land records Frank discovered that a man he knew, Dr. Gerald Bolick, owned land on the north side of Warrior Mountain which extended to the ridge of the mountain. So he telephoned Dr. Bolick and asked him if he could look over his land to determine if it would be suitable for use as a transmitter site. Bolick agreed to show Frank the land and they set up a meeting.

19. In late December 1987 or early January of 1988 they met. When Frank arrived at Bolick's home, Bolick introduced him to a third person, Arvil Greene. Greene too owned land on the ridge of the mountain. He also owned land which contained a road that they traveled to reach the top of the mountain.[3] When all three had reached the top, Greene and Bolick showed Frank where their land holdings abutted each other at the crest of the mountain. Frank wasn't able to determine where a site could be located, but Greene told him that the road would be available for access to the site if Bolick's property was used. A day or two after the meeting on the mountain Frank again talked with William Culpepper (see Finding 17 *supra.*), and they determined that the tower had to be located on Dr. Bolick's land.

20. In 1988, Arvil Greene divided all the land he had on Warrior Mountain and sold it to his children and their spouses. Steven Frank was completely unaware of these real estate transactions.

21. On March 30, 1989, the Commission granted Foothill's rulemaking petition, and established a window period for filing applications ending June 16, 1989. On May 1, 1989, Steven Frank arranged to have the Bolick land surveyed. He went back to Arvil Greene to get permission to

[3] Greene never mentioned that he had sold a small parcel of his Warrior Mountain land to his son-in-law, Allen Hennessee

use the road, permission for both himself and the surveyors. Green readily consented.[4] The survey completed, Foothills entered into an agreement with Dr. Bolick for the transmitter site land. That was the same day they filed BPH-890616MR.

22. On November 20, 1990, the Commission designated for hearing eight competing applicants for the Lenoir frequency, including Foothills and Ochoa. By early February, 1991 only three such applicants remained. The initial depositions were taken February 5 and 6, 1991. About this time Foothills' counsel suggested that Maria Ochoa might be vulnerable to a financial qualifications attack. He pointed out that Ochoa also planned to use Dr. Bolick's land for her transmitter site, but hadn't estimated the costs of obtaining electric power and road access to the site. He asked Frank to obtain the costs of these two items.

23. In carrying out Counsel's instructions Frank assumed that Ms. Ochoa would use the existing Greene road since it was already in existence, and Frank thought that it was probably the most inexpensive route. So sometime in mid-February, 1991, Frank drove to Orville Greene's house to get permission to have a contractor look at Greene's road and prepare an estimate for improving it.

24. Arvil Greene again gave Frank permission. But this time (and for the first time) he told Frank that he had divided his land among his children, and that if Frank wanted to use the road for a permanent access site he would have to talk to his son-in-law, Allen Hennessee.

25. On or around February 25, 1991, Frank spoke with Allen Hennessee on the telephone. Hennessee said he didn't want the road traversing his land to be used to access a radio tower on top of Warrior Mountain.

26. Frank talked to Foothill's counsel, Lawrence Bernard, about Hennessee's rejection. Bernard was concerned that Foothills, as well as Ochoa, wouldn't be able to gain access to the Bolick site. Frank assured Bernard that there were numerous landowners whose land abutted the crest of Warrior Mountain. Bernard then suggested that Frank get a declaration from one of those landowners, along with cost estimates for constructing the road and power line over that person's land.

27. Frank then telephoned Hennessee again. He asked Hennessee if he (Hennessee) would sign a declaration saying he wouldn't let *anyone* use the road to gain access to a radio tower on Warrior Mountain. Hennessee agreed to sign such a statement and he did so on February 27, 1991.

28. During this late February - early March 1991 time frame Frank went back to the Caldwell County land records. He copied tax maps showing the various land holdings on both the north and south sides of Warrior Mountain. He tried (unsuccessfully as it turned out) to correlate the maps of the north side landowners with the maps of the south side landowners. It seemed to Frank that the northwest corner of land owned by one Clyde Keyes on the south side map adjoined the southeast corner of Dr. Bolick's land on the north side map. As it turned out later Frank's assumption was completely erroneous.

29. In any event, Frank decided to talk to John Beall (Foothill's President) about his assumption. Beall said that he knew Clyde Keyes, telephoned him, and arranged a meeting. At the meeting Frank explained to Keyes that Foothills might want to use some of his land to construct a rough road leading to the top of Warrior Mountain where Foothills was planning to build a radio tower. Keyes agreed to make his land available, and signed a declaration to that effect on March 7, 1991.

30. On March 4-5, 1991, Frank and Western Carolina surveyors plotted a road access across Keyes' property to the point on Warrior Mountain where Dr. Bolick and Arvil Greene had told him (Frank) in 1987 that their land holdings met (Finding 19 *supra.*). This then was the reason that Foothills mistakenly represented to the Commission that Foothills had assurance of a right-of-way through Clyde Keyes' property to the Bolick property. It was not until Keyes supplied an affidavit on August 5, 1993, that Frank realized his mistake, i.e., that Keyes' tract on Warrior Mountain does *not* adjoin the tract belonging to Gerald Bolick where Foothills proposes to situate its transmitter.

31. In view of the foregoing, the finding is warranted that from March 7, 1991 until August 5, 1993, Foothills had a reasonable (albeit mistaken) basis for concluding it could acquire the right-of-way to use Mr. Keyes' property as a right-of-way.

32. However, on August 5, 1993, Clyde Keyes signed an additional statement (for Ochoa) that reads in part: ". . . the undersigned does not own land adjoining the Gerald Bolick property" (Foothills Ex. R-5, p.6). This second statement standing alone doesn't mean that Foothills couldn't reach the Bolick transmitter site from the Keyes property. Both properties extend to the ridge of the mountain, and a road over the Keyes' land to the ridge may well have permitted Foothills to use the existing ridge road to the Bolick site. So Frank's mistake was not necessarily fatal.

33. The Commission granted Foothills' application on May 10, 1993. See 8 FCC Rcd 3135 (1993). Ochoa asked for reconsideration on June 9, 1993. While this reconsideration request was pending, Ochoa bombarded the Commission with no less than *four* post-decision motions to reopen the record and enlarge the issues: on June 15, 1993; on July 15, 1993; on August 16, 1993; and on November 26, 1993.

34. But Foothills wasn't idle during this time period either. Foothills' principals discovered another road during a visit to the site in late May or early June 1993. And Beall and Respess decided to purchase the land over which that road ran because it provided more direct access and could be improved at less cost than constructing an entirely new road over Keyes' land. They purchased the access land from the Levi Land and Lumber Company during the summer of 1993, built the road to the Bolick site, completed construction of the station, and began operating it with the call sign WKVS in September 1993.

CONCLUSIONS OF LAW

1. We are concerned with whether the previous grant to Foothills Broadcasting, Inc. can be sustained. See 8 FCC Rcd 3135 (1993). Maria Ochoa has leveled a belated multi-pronged attack on that grant. She asserts that Foothills'

back in *1985*.

[4] Arvil Greene didn't tell Frank that he (Greene) no longer owned the land. As far as Frank was concerned Arvil Greene had been very cordial at the December 1987 meeting and had readily consented to Foothills using the road to take the surveyors to the site in May, 1989.

principal Steve Frank has misrepresented facts and deceived the Commission about Foothills' proposed transmitter site.

2. We held our remanded prehearing conference on March 28, 1994, our remanded evidentiary admission on April 7, 1994, and our remanded hearing on April 25-26, 1994. We closed the evidentiary record on April 26, 1994. See FCC 94M-309 released April 29, 1994. Both Foothills and Ochoa have filed their Proposed Findings of Fact and their Reply Findings.

3. *Remanded Issues (a) - (c).* Nothing is amiss (See Findings 5-34 *supra.*). Foothills hasn't misrepresented the facts to or attempted to deceive the Commission about their transmitter site. Moreover, they never lost their reasonable assurance to their transmitter site.

4. Ochoa's multi-pronged assertions are the product of mistaken and biased testimony. Her witnesses have not lied, but they are mistaken. Their key observations were defective and their reminiscences false. Arvil Greene's testimony was subject to the detecting influence of suggestion and the pleasure of imagination. See Findings 8-16 *supra.*

5. *Remanded Issue (d).* In light of the evidence adduced under remanded issues (a) - (c), Foothills is qualified to be and remain a Commission licensee.

6. *Remanded Issue (e).* In light of the evidence adduced under remanded issues (a) and (b) no forfeiture penalty is warranted against Foothills. The reason is simple. They have committed no wrong which would warrant assessing a forfeiture penalty.

So unless an appeal is taken from this Supplemental Initial Decision or the Commission reviews it on its own motion, Foothills Broadcasting, Inc.'s application (BPH-890616MR) IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[5] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Supplemental Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

SBC MEDIA VENTURES, INC.
Petition for Stay of Local
Rate Order of Montgomery
County, Maryland

ORDER

Adopted: June 23, 1994; Released: June 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. SBC Media Ventures, Inc. ("SBC-MV"), the franchisee in the above-referenced proceeding, filed with the Commission on May 25, 1994 a Petition for Stay of Enforcement Pending Review of the local Rate Order adopted by Montgomery County, Maryland ("the County") on April 29, 1994.[1] In its comprehensive Rate Order, Montgomery County establishes rates for basic tier service and associated equipment and requires SBC-MV to implement approximately $21 million in subscriber refunds.[2] In its petition for stay, SBC-MV does not challenge the legal basis for approximately $10 million of its $21 million total refund liability. Therefore, as explained in its petition for stay, SBC-MV is seeking only a partial stay of Montgomery County's Rate Order, involving $11 million in subscriber refunds and associated rate reductions.

2. Montgomery County's Rate Order is effectively divided into two parts. The first part addresses an alleged "rate discrimination" violation and is disputed by SBC-MV. The second part of the order is a ruling on the FCC Form 393[3] that SBC-MV filed with the County to determine its reasonable regulated rates. This part of the order accounts for $11 million in refund liability. SBC-MV challenges only a portion of this $11 million liability, accounting for $1 million in potential refunds. The rate discrimination part of the order accounts for $10 million in refund liability, all of which is disputed by SBC-MV. On June 6, 1994, Montgomery County filed an Opposition to Petition for Stay of Enforcement Pending Review,[4] urging the Commission to reject SBC-MV's petition and to allow Montgomery County's Rate Order to go into effect. Specifically, Montgomery County argues that the disputed portion of the Rate Order covering the rate discrimination issue should not be the subject of the stay petition because the question of its legality is already before the Commission in a separate proceeding[5] and because the County has voluntarily stayed this portion of the Rate Order until June 28, 1994. Montgomery County asserts that the other portions of the Rate Order to which SBC-MV objects have a reasonable basis and do not merit the grant of a stay.

II. BACKGROUND

3. The main disputed portion of Montgomery County's Rate Order involves an attempt by the County to declare that SBC-MV has engaged in rate discrimination in violation of the 1992 Cable Act and to remedy this alleged violation by ordering $10 million in subscriber refunds. To prevent its customers who only subscribe to the basic tier from experiencing proportionately large rate increases within a nine-month time span, SBC-MV capped this class of subscribers' rates at their existing levels, while increasing the basic service rate for all other subscribers. Specifically, basic-only subscribers who became customers on or before December 31, 1992 were grandfathered at the 1992 basic rate of $6.95 (exclusive of franchise fees); basic-only subscribers who became customers between January 1, 1993 and August 31, 1993 were grandfathered at the $10.00 rate effective during that period; and all other subscribers to SBC-MV's services were charged $13.95 for basic service, effective September 1, 1993. Therefore, by September 1, 1993 (the implementation date for the Commission's rate regulations), SBC-MV was offering basic tier service to three separate classes of subscribers at three different rates. SBC-MV claims that approximately 4 percent of its subscribers were affected by this grandfathering process and remained at either the $6.95 rate or the $10.00 rate, while 96 percent of its subscribers are now charged $13.95 for the basic tier.[6]

4. The County found that this practice constituted rate discrimination in violation of the local Cable Communications Law and in violation of the 1992 Cable Act. In response, the County ordered SBC-MV to refund to its subscribers the difference between the $13.95 basic rate charged to both its multi-package and post-September 1,

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[1] Along with its petition for stay, SBC-MV filed a Petition for Review of the County Rate Order on May 24, 1994. SBC-MV also submitted a letter to the Commission on June 10, 1994 addressing issues raised in its pleadings. Because replies to oppositions to petitions for stays are not accepted by the Commission, the merits raised in this letter have not been considered by the Commission in rendering this decision. *See* 47 C.F.R. § 1.45(d).

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] The Commission's Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") directs a cable operator to determine its maximum permitted rates for regulated service and equipment.

[4] Along with its Opposition to Petition for Stay, Montgomery County filed an Opposition to Petition for Review on June 8, 1994.

[5] On May 18, 1994, Montgomery County filed with the Commission a Motion for Declaratory Judgment. On June 2, 1994, SBC-MV filed an Opposition to the Motion for Declaratory Judgment.

[6] Upon receipt of the County's Rate Order, SBC-MV asserts in its petition for stay that it announced the end of its grandfathered rates, effective 30 days in the future.

1993 basic-only subscribers and the lowest rate charged to its grandfathered basic-only subscribers. Under the terms of the County's Rate Order, SBC-MV's refund liability would accrue from September 1, 1993 until the day that it implements uniform basic tier rates. Although the County acknowledges that this remedy is not specifically authorized under federal law, the County determined that it was authorized under local law. SBC-MV argues that its decision to grandfather a segment of its basic-only subscribers at their existing rates, while increasing the rates for the rest of its subscribers was a legitimate business judgment and does not constitute "geographic discrimination," as prohibited under the 1992 Cable Act. In the alternative, SBC-MV argues that even if the grandfathered rates were found to violate the 1992 Cable Act, the appropriate remedy would be a "cease and desist" order and not an order prescribing subscriber refunds. Conversely, the County asserts that an order requiring subscriber refunds is the best available remedy because it directly impacts those subscribers who have experienced SBC-MV's alleged "rate discrimination." The County further argues that, although the appropriate remedy for rate discrimination is uncertain under federal law, it has the authority under local law to order a subscriber refund to remedy a finding of rate discrimination. The County urges that the Commission reject SBC-MV's petition for stay with respect to the rate discrimination issue on the grounds that the issue should be resolved in a bifurcated proceeding and reviewed separately from the other issues raised in the stay petition.

5. With respect to that portion of the Rate Order addressing Form 393, the County acted as follows:

a. The County rejected SBC-MV's calculated Hourly Service Charge ("HSC") of $23.59 and prescribed an alternative HSC of $11.25. SBC-MV claims that this rate is impermissibly low as it falls below the $13.00 hourly rate paid to its service personnel. It is the County's position that absent proof to the contrary, it was reasonable for it to assume that SBC-MV's hourly payments to its contract labor are less than its payments to its own employees with the result being an average wage $11.25. Furthermore, the County asserts that SBC-MV repeatedly refused to provide additional information to verify the bases for its own derived HSC.

b. The County set a rate of $10.00 for the sale of A/B switches to subscribers by SBC-MV. SBC-MV claims that A/B switches are not items properly subject to regulation by the County because they are not used for the reception of basic service. The County contends, however, that SBC-MV has not borne its burden of proving that A/B switches are not used for the reception of basic cable service.

c. According to SBC-MV, SBC-MV's mandatory 1.5 percent PEG fee was not included as an internal cost (i.e., included on Line 101 of Form 393) in deriving its maximum permitted rate for basic tier service. SBC-MV's PEG fee is a fee required under its franchise agreement to support channels designated for public, educational and governmental purposes. SBC-MV claims it did not include the PEG fee in its basic rate calculations, but the County claims that it was unable to determine whether this was true. Furthermore, the County's Rate Order did not explicitly account for the inclusion of this fee as either an internal cost or allowable external cost. It is the County's position that if SBC-MV can demonstrate that it did not include the PEG fee in Line 101 of Form 393, then the County will recalculate the permitted rate based on the corrected numbers and extend SBC-MV's time for compliance accordingly, assuming this can be done without affecting the one-year limit on subscriber refunds.

d. The County has ordered SBC-MV to justify all of the various bulk basic rates it charges in the area.[7] The County has forewarned SBC-MV that in the event that the County finds any of these rates to be unreasonable it will reduce the unreasonable rates to the lowest bulk rate offered. The County claims that it has simply prescribed a remedy in the event that SBC-MV is unable to demonstrate that its current bulk rates are either grandfathered or otherwise justified under the Commission's rules. If SBC-MV can demonstrate that its bulk rates are lawful, the County will release SBC-MV from refund liability for these bulk rates. It is SBC-MV's position that this is unnecessary, for, irrespective of grandfathered rates already in place, it may negotiate new bulk rates as long as these new rates are uniform among Multiple Dwelling Units ("MDUs") of similar size and for contracts of similar duration.

III. DISCUSSION

6. The Commission evaluates petitions for stay under well-settled principles. To support a stay, a petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[8] As described below, resolution of this particular stay rests on the petitioner's argument with regard to the totality of this test, rather than with regard to one particular prong.

7. Under the 1992 Cable Act, cable operators must offer a rate structure that is uniform throughout the franchise area.[9] Furthermore, governmental entities, including franchising authorities, may prohibit cable operators from discriminating among subscribers.[10] Neither the 1992 Cable

[7] Bulk basic rates are discounted rates offered to multiple dwelling units, such as apartment buildings and condominiums.

[8] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[9] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(d), 47 U.S.C. § 543(d); and *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, ¶ 422 (released May 3, 1993) (*"Rate Order"*).

[10] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(e), 47 U.S.C. § 543(e).

Act nor the Commission's rules provide a specific remedy in response to proven instances of rate discrimination, including violations of the geographic uniformity requirement. In contrast, the Commission and local franchising authorities are explicitly authorized to order refunds of rates deemed to be unreasonable under the 1992 Cable Act and the Commission's rules. In the absence of federal legislative or administrative guidance, the County relied on local law to craft its own remedy of refunding to SBC-MV's subscribers the difference between the higher basic rate charged to both its multi-package and post-September 1, 1993 basic-only subscribers and the lower rate charged to its grandfathered basic-only subscribers. Because a Motion for Declaratory Judgment filed by the County is currently pending with the Commission on this issue and because the County's Rate Order does not appear to comply with any authorized remedy, we will stay the portion of the County's Rate Order that requires SBC-MV to issue refunds to subscribers for its past practice of offering different rates for basic tier service to particular classes of subscribers. This portion of the Rate Order totals approximately $10 million in potential subscriber refunds.

8. Generally, the Commission prefers to leave regulation of basic tier service to the sound discretion of the certified local franchising authorities. Although local franchising authorities have broad authority to encourage compliance with their requests for information, including setting rates, they must exercise the authority in accordance with the Commission's rules. *See Order* (Petition for Stay of Local Rate Order by Century Southwest Cable Television Corp. against the City of West Hollywood), DA 94-489 at para. 8 (released May 13, 1994). Because the County has not provided a reasonable basis for setting SBC-MV's HSC at $11.25, we will grant SBC-MV's stay request with regard to the portion of the Rate Order prescribing an HSC. However, it appears that SBC-MV has been unwilling to provide the County with the background information that it has requested in order to prescribe a reasonable HSC. Therefore, as a condition of this portion of the stay, SBC-MV must submit the requested information to the County within 10 days of the release of this order.[11]

9. Under the Commission's rules, rates for equipment that is used to receive basic tier service and that is offered for sale by cable operators are regulated.[12] Regulated equipment ". . . consists of all the equipment in a subscriber's home that is used to receive the basic tier. . . . Such equipment shall include, but is not limited to: (1) converter boxes; (2) remote control units; (3) connections for additional television receivers; and "(4) other cable home wiring."[13] This list of regulated " equipment is not intended to be an exhaustive list of all possible types of regulated equipment. Although SBC-MV is free to raise the issue on appeal, the County does not appear to have acted unreasonably in ruling that A/B switches are used for the receipt of basic service. SBC-MV disputes the County's capacity to set its price for A/B switches, but does not argue that the price set by the County is unacceptable. Therefore, SBC-MV's petition does not establish that a stay is necessary with regard to the County's setting of its rate for A/B switches because SBC-MV has not challenged the reasonableness of the actual rate set by the County.

10. A cable operator's permitted per channel charges for regulated programming services may be adjusted for changes in external costs measured on a per channel per subscriber basis.[14] Any cost of satisfying a franchise requirement to support public, educational and governmental channels is considered an external cost under the Commission's rules.[15] Therefore, SBC-MV should be allowed to account for its PEG fee in setting its regulated programming rates. However, the County has explicitly offered to allow SBC-MV to resubmit for approval a revised FCC Form 393 that includes a PEG fee allocation. Because the County will allow this resubmission, no stay of this portion of the Rate Order is necessary.

11. Under the Commission's rules, franchising authorities have the authority to regulate bulk basic rates to ensure compliance with the uniform rate provisions of the 1992 Cable Act.[16] In this instance, the County has simply informed SBC-MV of its intention to regulate its bulk basic rates. The County has asked SBC-MV to provide it with information that would allow it to make a determination regarding SBC-MV's bulk rates, but it has not ordered SBC-MV to modify any of its existing bulk rates. SBC-MV's petition does not establish that SBC-MV will suffer irreparable harm if a stay is not granted. In the event that the County renders a decision that SBC-MV believes is unreasonable, SBC-MV will have the opportunity to appeal that decision to the Commission at the proper time. The Commission's appellate role is to review the decisions rendered by local franchising authorities, but not to prevent them from first making those decisions. Therefore, a stay by the Commission on this issue would be premature.

12. To protect the interests of SBC-MV's subscribers and as a condition for the granting of this stay order, we will require SBC-MV, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of disputed money relating to the rate discrimination and Hourly Service Charge issues that the County has ordered SBC-MV to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates SBC-MV actually charges its customers and the rates that the County has set for SBC-MV's basic service and equipment in the County's local Rate Order. SBC-MV must furnish the Commission with documentation demonstrating compliance with this order within 30 days of the release of this order. Finally, SBC-MV must notify all subscribers of the possibility that they may receive a refund, and advise subscribers who may be planning to relocate outside the franchise area to provide SBC-MV with a forwarding address to which refunds may be delivered.[17]

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[11] The County has asked that SBC-MV provide the County with invoices for SBC-MV's contract labor and with a justification for the number of labor hours allocated to regulated services.

[12] 47 C.F.R. § 76.923(i).

[13] 47 C.F.R. § 76.932(a).

[14] 47 C.F.R. § 76.922(d)(2).

[15] 47 C.F.R. § 76.922(d)(2)(i)(C).

[16] *Rate Order* at ¶ 425.

[17] We are not prejudging the method of refund to be used by SBC-MV in the event that SBC-MV does not prevail on the merits. Rather, we take this action to ensure that all options remain open as provided in Section 76.942 of the Commission's rules (47 C.F.R. § 76.942).

13. Accordingly, IT IS ORDERED that the petition for stay filed by SBC Media Ventures, Inc. IS GRANTED IN PART AND DENIED IN PART.

14. IT IS ORDERED that the provision of Montgomery County's Rate Order governing rate discrimination IS STAYED pending review on appeal. IT IS FURTHER ORDERED that the provision of Montgomery County's Rate Order governing SBC Media Ventures' regulated hourly service charge IS STAYED pending review on appeal.

15. IT IS FURTHER ORDERED that SBC Media Ventures' Petition for Stay of Montgomery County's Rate Order regarding PEG fees IS DENIED. IT IS FURTHER ORDERED that SBC Media Ventures' Petition for Stay of Montgomery County's Rate Order regarding bulk service discounts IS DENIED. IT IS FURTHER ORDERED that SBC Media Ventures' Petition for Stay of Montgomery County's Rate Order regarding A/B switches IS DENIED.

16. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-77

In the Matter of

Billed Party Preference
for 0+ InterLATA Calls

ORDER

Adopted: June 24, 1994; Released: June 24, 1994

By the Chief, Policy and Program Planning Division, Common Carrier Bureau:

1. On June 6, 1994, Competitive Telecommunications Association (CompTel), Bell Atlantic, Teleport Communications, American Public Communications Council, and MFS Communications (hereinafter Joint Parties) filed a motion for extension of time to file comments in response to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Comments are scheduled to be filed by July 8, 1994 and replies by July 29, 1994. Joint Parties seek an extension until August 8, 1994 for comments and September 12, 1994 for replies.

2. The Joint Parties give three reasons for their request. First, they argue that the Commission seeks comment on many issues and that a number of these require the assembly of price and cost data and studies as well as detailed analysis. The Joint Parties assert that, given the large amount of information requested, the thoroughness and usefulness of the record will be enhanced immeasurably if an additional month is provided for comments and a total of five weeks is provided for reply comments. Second, the Joint Parties argue that an extension of time will help minimize the likelihood that a multitude of detailed *ex parte* filings will be made after the comment cycle has ended. They state that an extension will allow all parties to develop more fully the substantive data and analysis requested in their initial comments, thereby permitting parties to make their primary reply thereto within the scheduled comment cycle. Third, the Joint Parties ask that deadlines be extended so as to accommodate the vacation schedules of key personnel for the July 4th and Labor Day weekends.

3. We do not routinely grant extensions of time.[2] In this case, however, we are aware that the data we seek includes a significant amount of empirical information that may not be easy to collect quickly. We also observe that no party has opposed this extension of time and that the Joint Parties state that both AT&T and BellSouth have reviewed this request for extension and that both have indicated that they have no objection to it. Therefore, in the interests of allowing all parties to develop more fully the substantive data and analysis requested in their initial comments and permitting thorough responses to those data to be made in reply comments, thereby enhancing the completeness of the record for evaluating BPP, we are willing to grant parties an extension of time in which to file comments and replies. We believe, however, that the comment and reply dates proposed by the Joint Parties would result in excessive delay, the need for which is not clearly demonstrated in their petition. Therefore, we grant all parties an extension of time for the filing of comments from July 8, 1994 to August 1, 1994 and for the filing of reply comments from July 29, 1994 to August 31, 1994.

4. Accordingly, IT IS ORDERED that the Joint Parties Request for Extension of Time IS GRANTED to the extent provided herein, and otherwise IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning
Division, Common Carrier Bureau

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[1] Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77, FCC 94-117 (June 6, 1994).

[2] 47 C.F.R. § 1.46(a).

[3] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

User Friendly Computers
Denver, Colorado

NAL/Acct. No. 215DV0078

ORDER

Adopted: June 20, 1994; **Released: July 5, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Mr. Peter K. Adams, President, User Friendly Computers (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued for violation of Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b) (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $5,600.

II. BACKGROUND

2. On August 20, 1992, the Commission's Denver Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for offering for sale in a retail sales environment personal computers that lacked an equipment authorization issued by the Commission. Based on the response from Petitioner, the Denver Office issued a Notice of Forfeiture (NOF) for $7,000 on September 25, 1992. Petitioner now appeals. Petitioner contends that the violation was not willful and therefore, the penalty should be reduced or cancelled.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at Paragraphs I, II, and III of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Review of these arguments raised in the petition as well as review of the NAL and NOF, reveals that Petitioner has misinterpreted the meaning of the word "willful". Section 312(f)(1) of the Act, which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.[1]

4. We note, additionally, that there is no prior record of violations of this type on the part of Petitioner. We are, therefore, reducing the penalty partly for that reason.

5. Petitioner claims that it cannot pay the forfeiture and submitted financial information in support of this contention. The financial information does not support this contention and we will not reduce the forfeiture amount for that reason.

IV. ORDERING CLAUSES

6. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

7. IT IS FURTHER ORDERED that User Friendly Computers must pay the forfeiture amount of Five Thousand, Six Hundred Dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[2] Please place NAL/Acct. No. 215DV0078 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

8. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Petitioner.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

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[1] *See Southern California Broadcasting*, 6 FCC Rcd 4387 (1991).

[2] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Computer, Inc.
Denver, Colorado

NAL/Acct. No. 215DV0077

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. National Computer, Inc. (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued pursuant to Section 503(b) of the Communications Act of 1934 (the Act), 47 U.S.C. §503(b), for violation of Section 302(b) of the Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $5,600.

II. BACKGROUND

2. On August 20, 1992, the Commission's Denver Office issued a Notice of Apparent Liability (NAL) to Petitioner. The penalty was imposed for marketing uncertified personal computers. Based on the response from Petitioner, the Denver Office issued a Notice of Forfeiture (NOF) for $7,000 on September 25, 1992. Petitioner now appeals. It contends that one of the models cited, Mitek 386, was in fact certified but that the label was missing at the time of the inspection. It contends that the other model cited, DTK KEEN-4000 386-40, is sold only to corporate customers.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. These arguments are addressed below.

4. Petitioner asserts that the violations were not willful. It contends that the label from the Mitek unit had been removed only temporarily for the purpose of copying and was reattached after the inspector's visit. Nevertheless, the equipment was offered for sale to the inspector without the required label and there is no information in the record to show that the sales representative indicated to the inspector that it could be sold only after reattachment of the missing label. Furthermore, Petitioner indicates that the label was removed for a specific purpose. It did not fall off due to faulty adhesive or other defect that was unknown to petitioner.[1] Thus, the offering of the unlabelled Mitek unit to the FCC inspector constitutes a willful act within the definition of that term.

5. Petitioner claims that the NOF contains additional charges that were not mentioned in the NAL. In its response to the NAL, Petitioner contends that the DTK KEEN-4000 386-40 computer is Class A approved and sold only to corporate customers, for which certification is not required. The NAL was issued because it appeared that the DTK KEEN-4000 386-40 was being offered for sale as a Class B personal computer, which requires certification. *See, e.g.* 47 C.F.R. §15.3(s). The NOF simply explained that Petitioner's employee did not mention the sales restriction of the DTK KEEN-4000 386-40 to corporate customers only until after the FCC inspector disclosed his identity. This is not an additional charge because it does not change the basis for which the NAL was issued -- selling unauthorized equipment.

6. However, we note that Petitioner has no history of prior violations of this type. Therefore, we are taking this into consideration and adjusting the amount of the penalty downward. Petitioner has provided no other information that would merit cancellation or further mitigation of the penalty.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

8. IT IS FURTHER ORDERED that Petitioner must pay the forfeiture amount of five thousand, six hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[2] Please place NAL/Acct. No. 215DV0077 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

9. IT IS FURTHER ORDERED that Petitioner BE PUT ON NOTICE that any future failure to affix a required label or any removal of a required label from a product that is required to be labelled prior to marketing, or to affix a label bearing an equipment authorization code (FCC ID) that does not match the particular make and model of

[1] Section 312(f)(1), which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[2] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

equipment for which that code was authorized, will be considered a violation of Sections 2.925 or 2.926 of the Commission's Rules and will result in assessment of additional monetary forfeitures.

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Petitioner and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Larry Ritchie NAL/Acct. No.315PS0003
Lakin, West Virginia

Liability for Forfeiture

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a letter submitted by Larry Ritchie (Petitioner), requesting reconsideration of a $2,000 monetary forfeiture issued by the Commission's Powder Springs field office to Petitioner pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C.§ 503(b), for willful and repeated violation of Section 301 of the Act, 47 U.S.C. § 301, by operating a radio station on October 12, 14, and 17, 1992, on the frequency of 5555.0 kHz without having a license or other authorization from the Commission. After review of the facts associated with this matter, we are reducing the forfeiture.

2. The appropriate amount of this forfeiture is $1,600.

II. BACKGROUND

3. On October 12, 14, and 17, 1992, Petitioner was monitored operating a ship radio station on the frequency 5555.0 kHz. Petitioner's station did not have a license or other authorization from the Commission for the use of this frequency.[1]

4. Although Petitioner failed to identify his station by call sign or other means, Commission staff was able to identify the station through a variety of investigative techniques, including direction finding and telephone calls to his employer and river lock operators through whose locks his vessel passed.

5. On October 23, 1992, the Commission's Powder Springs Office issued a Notice of Apparent Liability for Monetary Forfeiture (NAL) to Petitioner proposing a $2,000 penalty. Petitioner responded by letter dated November 4, 1992. He did not deny the operation but claimed there was no willful intent to violate the law in his actions. He also asserted that the amount of the proposed penalty was too high for a first-time offender, but provided no documentation to support his assertion.

6. After review of Petitioner's response, the Powder Springs Office issued a Notice of Forfeiture (NOF) to Petitioner on November 20, 1992. Petitioner responded with a letter received December 21, 1992, again claiming inability to pay and furnishing a list of his monthly financial obligations.

III. DISCUSSION

7. Petitioner willfully and repeatedly violated Section 301 of the Act on October 12, 14, and 17 by operating his ship radio station on 5555.0 kHz, a frequency for which he held no license or other authorization issued by the Commission.

8. The violations were both repeated and willful.[2]

9. Petitioner asserts that a $2,000 penalty is excessively high for a first-time violation. The base forfeiture for a first time violation of Section 301 of the Act in radio services other than broadcast and common carrier is $8,000.[3] The monetary forfeiture amount was reduced because Petitioner is an individual and the violation was considered minor. We will also reduce the amount because Petitioner has no record of prior violations.

10. Petitioner asserts that he is financially unable to pay the penalty. In support thereof, he submitted an estimate of his monthly financial obligations. Petitioner has not submitted sufficient evidence, such as tax returns, which were requested in the NAL, to enable us to evaluate this claim.

11. Petitioner has provided no other facts or information that would justify cancellation of the forfeiture amount.

IV. CONCLUSION AND ORDERING CLAUSES

12. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§1.80, 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

13. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED that Larry Ritchie FORFEIT to the United States the sum of two thousand dollars ($2,000) for the willful violation of Section 301 of the Communications Act.

14. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that the forfeiture must be paid within thirty (30) days of the date of release of this order.[4] Payment should be made by check

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[1] The frequency 5555.0 kHz is within the band of frequencies allocated for use by aircraft. Ship stations are not authorized to operate on that frequency. *See* 47 C.F.R. Part 80, Subpart H, which lists all frequencies authorized for use by ship radio stations.

[2] Section 312(f)(1), which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[3] *See Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

[4] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W.,

or money order payable to the Federal Communications Commission, Attn: NAL/Acct. 315PS0003 and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, IL 60673-7482

15. IT IS FURTHER ORDERED that Petitioner BE PUT ON NOTICE that any future violations of Section 80.102(a) of the Commission's Rules by making transmissions that are not identified by the station's call sign will result in assessment of an additional monetary forfeiture.

16. IT IS FURTHER ORDERED that the Field Operations Bureau send by certified mail, return receipt requested, one copy of this Order to Petitioner.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jinma Computer Company
Flushing, NY

NAL/Acct. No. 215CG0014

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Jinma Computer Company, Inc., (Petitioner) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $7,000 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for willful violation of Section 302(b) of the Act, 47 U.S.C. §302(b), and Section 2.803(b) of the Commission's Rules, 47 C.F.R. § 2.803(b). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $5,600.

II. BACKGROUND

2. On May 20, 1992, the Commission's Chicago Office issued a Notice of Apparent Liability (NAL) to Jinma Computer Company, Inc. The penalty was imposed for marketing a computer device (the "Jinma VGA card VC136") without certification or authorization by the Commission in violation of Section 302(b) of the Act and Section 2.803(b) of the Rules. Jinma exhibited the device on April 6-9, 1992, at the Spring '92 COMDEX show without displaying either a certification label or a notice that the device was not authorized by the Commission and was being offered for demonstration purposes only and could not be sold. Based on Petitioner's response, the Chicago Office issued a Notice of Forfeiture (NOF) for $7,000 on August 10, 1992. Petitioner now appeals.

3. The Petitioner contends that, according to its supplier, the device it exhibited was in fact certified. In its response to the NAL, Petitioner provided what it thought was the identification for the device (FCC ID I7KV2-91005). Petitioner later submitted a second number which it claimed was the correct identification number (FCC ID I7K-VO-91002). Petitioner also submitted photographs showing details of the computer device and claimed that it could not find a way to satisfactorily photograph the FCC ID number of the device.

III. DISCUSSION AND CONCLUSION

4. The arguments raised in Petitioner's letter requesting reconsideration have been thoroughly considered and are incorporated herein by reference. Review of these arguments raised in the petition as well as review of the NAL and NOF, reveals that Petitioner's claims are not supported by the record. The photographs submitted by Petitioner do not represent the VGA card which was inspected and photographed by the Commission at the computer show. Further, Petitioner's claim that the device it displayed at the COMDEX show was actually labelled with FCC ID I7K-VO-91002 is also not supported by the record, and is not credible. The FCC official who inspected the device noted the identification number for all other devices on display, but expressly noted that the VGA card at issue carried no label. Petitioner's belated attempts to show that the device which was inspected actually carried a label and was properly certified, under a different number than the one claimed earlier, is self-serving and not credible.

5. However, in accordance with the Commission's forfeiture guidelines, and Section 503(b) of the Act, 47 U.S.C. § 503(b), which may allow reductions on the basis of several mitigating factors, we are reducing the forfeiture amount to $5,600 because Petitioner has no history of prior violations. *See Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993).

IV. ORDERING CLAUSES

6. IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, that the Petition for Reconsideration is GRANTED to the extent indicated herein and DENIED in all other respects.

7. IT IS FURTHER ORDERED THAT Jinma Computer Company, Inc. must pay the forfeiture amount of five thousand six-hundred dollars ($5,600) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215CG0014 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

8. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Jinma Computer Company, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jan Lane, Inc. NAL/Acct. No. 315BE0014
2 Middle Street
Fairhaven, MA 02719

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Jan Lane, Inc. (Jan Lane) filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued pursuant to Section 503(b), 47 U.S.C. §503(b), for willful violation of Section 301 of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. §301. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On April 13, 1993, the Commission's Belfast Office issued a Notice of Apparent Liability (NAL) to Jan Lane. The penalty was imposed for operating on a frequency for which it had no authorization from the Commission. Based on the response from counsel on behalf of Jan Lane, the Belfast Office issued a Notice of Forfeiture (NOF) for $2,000 on October 29, 1993. Jan Lane now appeals. The petitioner contends that the FCC did not provide evidence that Jan Lane willfully violated the Act; that the transcript did not indicate that the employee of the petitioner, Robert Pendergast, had knowledge that he was operating on an unauthorized frequency; that the FCC did not address "how an intentional and 'willful' violation by an agent imposes liability on behalf of an unknowing principal corporation." Additionally, petitioner contends that "the FCC's identification of Mr. Pendergast is suspect at best."

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed.

4. We would like to note that Jan Lane Inc., as owner of the F/V Alpha Omega II, was not licensed to transmit on 5696.5 kHz. Thus, an employee transmitting on an unauthorized frequency does not excuse a corporation's violation since corporations are responsible for the acts of their employees.

5. It is also noted that petitioner made no claims of inability to pay the forfeiture, and no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

6. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. §503(b), and Section 1.106 of the Rules, 47 C.F.R. §1.106, the petition for reconsideration is DENIED.

7. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules, 47 C.F.R. §1.80, Jan Lane, Inc. must pay the forfeiture amount of two thousand dollars ($2,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315BE0014 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

8. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Jan Lane Inc. and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Impac Protection Services Detroit, MI — NAL/Acct. No. 215DT0013

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Impac Protection Services filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $20,000 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 503(b), for willful and repeated violation of Section 301 of the Act, 47 U.S.C. § 301. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On July 17, 1992, the Detroit Field Office issued a Notice of Apparent Liability (NAL) to Impac Protection Services. The penalty was imposed for unauthorized operation of a radio station on the frequencies of 462.125 MHz and 467.125 MHz from July 16-18, 1991. Based on the response from Impac Protection Services, the Detroit Field Office issued a Notice of Forfeiture (NOF) for $20,000 on October 15, 1992. Impac Protection Services now appeals. The petitioner essentially claims that it did not willfully violate Section 301 and additionally claims that it is unable to pay the forfeiture, submitting in support of the latter claim a number of balance sheets for periods in 1991 and 1992.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at 1-4 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. Although the petitioner claims inability to pay the forfeiture, the documentation it submitted in response to the NOF was insufficient to evaluate this claim. However, review of our records indicates that petitioner has no prior violations and that one day on which the violation was repeated in this case is beyond the applicable statute of violations and for which no forfeiture may be assessed. Accordingly the forfeiture is reduced to $12,800.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the petition for reconsideration is DENIED in part and GRANTED to the extent indicated herein.

5. IT IS FURTHER ORDERED that Impac Protection Services must pay the forfeiture amount of twelve thousand eight hundred dollars ($12,800) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 215DT0013 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U. S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Impac Protection Services and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

William K. Schweitzer dba Yellow Cab Company of Palo Alto
Palo Alto, California

Nal No. 315SF0036

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. William K. Schweitzer dba Yellow Cab Company of Palo Alto filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $4,000 issued pursuant to Section 503, 47 U.S.C. § 503, of the Communications Act (Act) for violation of Section 90.113 of the Commission's Rules, 47 C.F.R. § 90.113. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On February 24, 1993, the San Francisco Office of the Field Operations Bureau issued a Notice of Apparent Liability (NAL) in the amount of $4,000 to William K. Schweitzer dba Yellow Cab Company of Palo Alto (Yellow Cab). The penalty was imposed for operating a fixed mobile relay transmitter at location not authorized under its license and for operating a fixed control station on a mobile frequency. Yellow Cab failed to respond to the NAL and the San Francisco Office issued a Notice of Forfeiture (NOF) for $4,000 on April 13, 1993. Yellow Cab now appeals. The petitioner contends that it is unable to pay the fine and has submitted tax returns to support its claim. In addition, the petitioner claims that it operated at the unauthorized location on an experimental basis only to see if operation at that location would meet its communications needs.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the petition have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments as well as review of the NAL and NOF, we find that the petitioner fails to present any arguments or evidence that warrant reduction or cancellation of the fine. Although the petitioner claims inability to pay the forfeiture, the tax returns submitted by the petitioner demonstrate that it has sufficient gross income to pay the fine. In addition, the petitioner's contention that its operation at the unauthorized location was for experimental purposes only does not excuse its liability under the rules, nor is there any evidence that petitioner intended to obtain a license for this location prior to when the NAL was issued. Accordingly, the forfeiture is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED pursuant to Section 1.80 of the Rules, 47 C.F.R. § 1.80, that William K. Schweitzer dba Yellow Cab Company of Palo Alto must pay the forfeiture amount of four thousand dollars ($4,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315SF0036 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to William K. Schweitzer dba Yellow Cab Company.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John McHenry NAL/Acct. No. 315FE0003
Seattle, Washington

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. John McHenry (Petitioner)[1] has filed a letter requesting reconsideration of the Notice of Forfeiture (NAL/Acct. No. 315FE0003) in the amount of $1,600, issued pursuant to Section 503, 47 U.S.C. § 503, of the Communications Act, (the Act) for violation of Sections 80.102(a), 80.207(a)(1), 80.359(a) and (b), and 80.373(f) of the Commission's Rules, 47 C.F.R. §§ 80.102(a), 80.207(a)(1), 80.359(a)and (b), 80.373(f). For the reasons noted below, the Bureau reduces the monetary forfeiture amount to $100.

II. BACKGROUND

2. On October 6, 1992, the Commission's Ferndale office issued a Notice of Apparent Liability (NAL) to the petitioner. The penalty was imposed for petitioner's voice transmissions on Marine Channel 70 (156.525 MHz) from his vessel, SEYMOUR, without the required station identification. This channel is not available for voice communications. Based on the response from Mr. McHenry, the Ferndale office issued a Notice of Forfeiture (NOF) for $1,600 on October 19, 1992. Petitioner now appeals. Petitioner contends the violation was not willful because it was done inadvertently. Petitioner, argues that Channel 70 is widely used for voice communications by vessel owners and that the changes limiting the use of this channel to digital selective calling are not widely known.

III. DISCUSSION AND CONCLUSION

3. The arguments raised by Petitioner have been thoroughly considered and are incorporated herein by reference. Review of these arguments, as well as review of the NAL and NOF, reveals that the petitioner failed to present any evidence to mitigate or cancel the forfeiture. Although it may be true that violations are widespread, it is for just this reason that the Commission has stepped up its enforcement efforts in this area.[2] The Commission has, however, reconsidered the forfeiture amounts issued for these types of violations, and has reduced the amounts imposed on first time violators operating in this service. Thus, the forfeiture amount will be reduced accordingly.

IV. ORDERING CLAUSES

4. IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration is GRANTED in part and DENIED in all other respects.

5. IT IS FURTHER ORDERED that John McHenry must pay the forfeiture amount of one hundred dollars ($100) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[3] Please place NAL/Acct. No. 315FE0003 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to John McHenry and the Fishing Vessel Owner's Association.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau.

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[1] The Fishing Vessel Owner's Association also filed a letter on Mr. McHenry's behalf.

[2] The Commission, through its local offices and Public Service staff, has on-going education and compliance programs which work with local trade and public service organizations to educate the public we regulate regarding Communications Act and Rule requirements. We, therefore, welcome the Fishing Vessel Owner's Association offer to assist us in educating its members regarding proper use of the Marine Radio Service, and invite it to work with the Commission's local office.

[3] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-67

In the Matter of

Amendment of Section 73.202(b), RM-8481
Table of Allotments,
FM Broadcast Stations.
(Collegeville, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1994; Released: July 6, 1994

Comment Date: August 27, 1994
Reply Comment Date: September 13, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Saint John's University ("petitioner"), requesting the allotment of Channel 260A to Collegeville, Minnesota, and its reservation for noncommercial educational use. Petitioner submitted an engineering analysis in support of the proposal and states its intention to apply for the channel, if allotted.

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. According to petitioner, there are no noncommercial educational channels available for use at Collegeville because of the community's proximity to other noncommercial stations. Petitioner notes that reservation of Channel 260A as a noncommercial channel would further the public interest by ensuring that the scarce financial resources available would be devoted directly to improving radio service rather than diverted to cover the cost of a protracted comparative hearing against commercial entities.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the commission allot channels "... among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U. S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL,* 5 FCC Rcd 3774 (1990); *Hannibal, OH,* 5 FCC Rcd 3315 (1990); and *Statenville, GA,* 5 FCC Rcd 2685 (1990). Although Collegeville is attributed with a population of 150 persons, a post office and zip code by the 1994 edition of the *Rand McNally Commercial Atlas,* we may find that a population grouping does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social or civic organizations. *See, e.g., Searles Valley, CA,* 3 FCC Rcd 5221 (1988); *see also, Naples, FL,* 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Collegeville, Minnesota, to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.

4. We believe the public interest would be served by proposing to allot Channel *260A to Collegeville, Minnesota, in the event it is ultimately found to qualify as a community for allotment purposes, and to reserve the channel for noncommercial educational use. Our review of petitioner's proposal confirms that Channel *260A can be allotted to Collegeville in compliance with the Commission's minimum distance separation requirements with a site restriction 8.8 kilometers (5.5 miles) southeast of the community.[1] We note, however, that Channel 260A is the only class A channel that can be allotted to Collegeville. Any expressions of interest for the use of the channel as a commercial facility should be made during the comment period.

5. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Collegeville, Minnesota	---	*260A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 27, 1994**, and reply comments on or before **September 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Bodorff
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, N. W.
Washington, D.C. 20006

[1] The coordinates for Channel *260A at Collegeville, Minnesota, are 45-31-24 and 94-18-48.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Donald D. Bishop
Fort Bragg, California

NAL/Acct. No. 315SF0041

ORDER

Adopted: June 15, 1994; Released: July 5, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Donald D. Bishop filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $2,000 issued for violation of Section 503(b) of the Communications Act of 1934, as amended, (the Act), and Section 301 of the Act 47 U.S.C. § 301. For the reasons noted below, the Bureau reduces the monetary forfeiture.

II. BACKGROUND

2. On April 6, 1993, the San Francisco field office issued a Notice of Apparent Liability (NAL) to Donald D. Bishop. The penalty was imposed for unauthorized operation of a VHF marine radio station. Based on the response from Donald D. Bishop, the San Francisco field office issued a Notice of Forfeiture (NOF) for $2,000 on May 18, 1993. Donald D. Bishop now appeals. The petitioner contends that he thought the license was good for as long as he owned the boat and that the fine is excessive and he is having financial difficulty.

III. DISCUSSION AND CONCLUSION

3. The arguments raised at paragraphs 2 and 3 of the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of these arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. However, we note that the Commission has reconsidered forfeiture amounts subsequent to the issuance of this forfeiture. *See 1993 Policy Statement,* 8 FCC Rcd 6215 (1993). We will reduce this forfeiture accordingly because the violation warrants a forfeiture less than that envisioned by the *Policy Statement.*

4. Although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support this claim. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

5. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is GRANTED in part and DENIED in all other respects.

6. IT IS FURTHER ORDERED that, pursuant to Section 1.80, 47 C.F.R. § 1.80, Donald D. Bishop must pay the forfeiture amount of One Hundred Dollars ($100) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315SF0041 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Donald D. Bishop and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-288

In the Matter of

Iowa Public Safety Plan

ORDER

Adopted: June 20, 1994; Released: July 5, 1994

By the Deputy Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Iowa (Region 15) Public Safety Plan (Plan) on February 10, 1993, 8 FCC Rcd 985 (1993).

2. By letter dated February 3, 1994, the Region proposed to amend its Plan. The proposed amendment would reserve all unassigned channels for the State of Iowa. The Commission placed the letter on Public Notice for comments due on May 16, 1994, 59 FR 17784 (April 14, 1994). One comment was received from the Wisconsin Department of Transportation requesting that coordination be made with Wisconsin when any of the frequencies in question will be used within 75 miles of the Wisconsin border or if there is a possibility that a 40 dbu contour will extend into Wisconsin. The State of Iowa has agreed to this coordination.

3. We have reviewed the proposed amendment to the Region 15 Plan and conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Iowa (Region 15) IS AMENDED, as set forth in the Region's letter of February 3, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs
Deputy Chief, Land Mobile and
Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-55

In the Matter of

Amendment of Section 73.202(b), RM-8454
Table of Allotments,
FM Broadcast Stations.
(Vail, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1994; Released: July 5, 1994

Comment Date: August 26, 1994
Reply Comment Date: September 12, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Ryan B. Smith and Jennifer Tufty ("petitioners") requesting the allotment of Channel 237A to Vail, Colorado, as that community's second local FM service. Petitioners failed to state their intention to apply for Channel 237A if it is allotted to Vail, and if authorized, to build a station promptly, as required by the Commission in the Appendix to the *Notice*. Therefore, petitioners are requested to clarify their intentions in comments in response to the *Notice*.[1]

Technical Statement

2. A staff review of the proposal reveals that Channel 237A can be allotted to Vail, Colorado, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 1.2 kilometers (0.75 miles) northwest of the community at coordinates North Latitude 39-39-01 and West Longitude 106-22-45, to avoid short-spacing to the licensed site of Station KRDO-FM, Channel 236C, Colorado Springs, Colorado, at coordinates North Latitude 38-44-47 and West Longitude 104-51-37.

3. We believe the public interest would be served by proposing the allotment of Channel 237A to Vail, Colorado, since an interest has been expressed in providing a second local FM service to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Vail, Colorado, as follows:

	Channel No.	
City	Present	Proposed
Vail, Colorado	284C1	237A, 284C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 26, 1994**, and reply comments on or before **September 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, as follows:

Ryan B. Smith and Jennifer Tufty
c/o Ryan B. Smith
4026 Helen Court
Rapid City, South Dakota 57702

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been

[1] Although the petitioners' request was submitted by Ryan Smith, he failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioners are requested to rectify this omission in their comments.

served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-61

In the Matter of

Amendment of Section 73.202(b), RM-8464
Table of Allotments,
FM Broadcast Stations.
(Garberville and Hydesville,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 9, 1994; Released: July 5, 1994

Comment Date: August 26, 1994
Reply Comment Date: September 12, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Brett E. Miller ("petitioner"), permittee of Station KWEO(FM), Channel 279C1, Garberville, California, requesting the reallotment of Channel 279C1 from Garberville to Hydesville, California, and the modification of its construction permit to specify Hydesville as its community of license. Petitioner states that it will apply for Channel 279C1 at Hydesville if reallotted, as requested.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License* ("Modification"), 4 FCC Rcd 4870 (1989), *recon. granted in part,* 5 FCC Rcd 7094 (1990). Petitioner states that the requested reallotment to Hydesville is mutually exclusive with the existing allotment of Channel 279C1 at Garberville. The distance between Garberville and the petitioner's specified site at Hydesville[1] is 51 kilometers (32 miles), whereas a distance of 245 kilometers (152 miles) is required in this instance. Petitioner also states that Hydesville is listed in the 1990 U.S. Census as a census designated place and is attributed therein with a population 1,131 residents. In further support of its proposal, petitioner advises that the reallotment of Channel 279C1 from Garberville to Hydesville is in the public interest as it will not deprive Garberville of its sole local aural transmission service,[2] and will provide Hydesville with its first local aural transmission service. Petitioner's engineering statement also states that the reallotment would enable Station KWEO(FM) to increase its service area from 15,961 square kilometers containing 41,093 persons to an area of 16,784 square kilometers containing 111,153 persons.[3]

3. In further support of its proposal petitioner advises that its currently approved transmitter location at coordinates 40-07-13 and 123-41-32 (File No. BMPH-930827IE), is in very close proximity to a State Department of Forestry ("Forestry") fire lookout tower, which in the past has been a source of controversy regarding the effects of radiofrequency radiation from other facilities at the site. As a result, petitioner advises that its construction permit authorization precludes the automatic program test provisions of Section 73.1620. Rather, petitioner advises that a formal request for program test authority must be requested before such will be authorized, and must contain documentation to demonstrate acceptable radiofrequency radiation (RF) levels at the Forestry's fire lookout tower site. Petitioner advises that its engineering studies have been unable to remove uncertainty that the proposed construction of Station KWEO(FM)'s transmitter at the fire lookout tower site would result in acceptable RF field strengths. Petitioner advocates that the instant proposal would resolve the technical problems associated with its currently authorized site since it has obtained certification for an established tower site that is devoid of RF concerns.

4. We believe the public interest would be served by proposing the reallotment of Channel 279C1 from Garberville to Hydesville, California, since it could provide the latter community with its first local aural transmission service and would enable Station KWEO(FM) to increase its service area. However, as petitioner proposes to relocate its transmitter site to accommodate its proposal, it will result in areas that will lose existing reception service. Therefore, although petitioner provided information in its proposal concerning the areas and populations which will receive a new service, it is requested also to provide information concerning the areas and populations which will lose existing service if Channel 279C1 is reallotted to Hydesville.[4] The study should also reveal the total reception service that is now available within the gain and loss areas.[5]

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[1] Coordinates specified by the petitioner for a transmitter site at Hydesville are 40-23-00 North Latitude and 124-11-00 West Longitude. Coordinates at the authorized site for Station KWEO(FM) at Garberville are 40-07-13 North Latitude and 123-41-32 West Longitude.

[2] Garberville is also served by Station KBEY(FM) Channel 284C, as well as noncommercial educational Station KMUD(FM), Channel 216C3.

[3] The engineering statement also advises that although some of the areas contained within the present and predicted 60 dBu contours of Station KWEO(FM) lie over the Pacific Ocean, no adjustments were made for that in the stated contour-encompassed areas.

[4] As the Commission has previously stated: "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." *See Modification, supra,* at 5 FCC Rcd 7097.

[5] Reception services are those aural broadcast services that can be received within a given geographical area, including full-time

5. The petitioner's modification request at Hydesville is consistent with the provisions of Section 1.420(g) and (i) of the Commission's Rules. Therefore, we shall propose to modify the construction permit for Station KWEO(FM) without entertaining competing expressions of interest in the use of Channel 279C1 at Hydesville, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

6. Channel 279C1 can be allotted to Hydesville, California, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 19.7 kilometers (12.2 miles) south of the community.

7. In view of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Garberville, California	279C1, 284C	284C
Hydesville, California	--	279C1

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **August 26, 1994**, and reply comments on or before **September 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Brett E. Miller
11608 Blossomwood Ct.
Moorpark, CA 93021

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also

AM and FM commercial stations. In determining reception service provided by an FM station, the area of service circumscribed by the station's 1.0 mV/m signal contour should be considered, assuming maximum facilities for the class of station except Class C. For Class C stations, the licensed facilities or the *minimum Class C* facilities, whichever is greater, should be considered. The area of reception for full-time AM stations is defined according to whether it is a Class A AM station or another class of full-time AM station. For a Class A station, called a clear channel station, the reception area is defined by a station's 0.5 mV/m groundwave contour, based on its licensed facilities. For allocation purposes, all other classes of full-time AM stations, reception service is defined as that service received within a station's *nighttime* interference-free contour. For purposes of determining the availability of aural services in the areas affected by a change of community proposal, a petitioner should include in its study reception services provided by all relevant AM and FM stations. Reception areas that receive at least five radio services are considered to be well-served. Accordingly, within a given reception area, any count of radio services beyond five is unnecessary.

expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Faircom Southampton, Inc. — File No. BALH-940114GH

For Assignment of License of
Station WHFM(FM)
Southampton, New York

MEMORANDUM OPINION AND ORDER

Adopted: June 17, 1994; Released: July 5, 1994

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. The Bureau has before it for consideration: (i) an application for assignment of license of Station WHFM(FM), Southampton, New York, (File No. BALH-940114GH) from Faircom Southampton, Inc. to Liberty Broadcasting of New York, Inc. (Liberty); (ii) a pleading styled as a petition to deny the above-referenced application filed by David Naylor on February 14, 1994; (iii) an opposition filed by the assignee; and (iv) a reply to the opposition filed by Mr. Naylor.

II. PLEADINGS

2. In his pleading, Mr. Naylor states that he is a member of the NAACP and the National Black Media Coalition and has experience in radio and communications generally. He states that he applied for openings for which he was qualified at WBAB-FM in May and August 1993. He further states that Liberty sent him a letter each time indicating that the position for which he applied was filled and requested he send back a form identifying his race and referral source, which he states that he did. Because it rejected him for both jobs without an interview, Mr. Naylor believes and argues that Liberty discriminated against him because he is Black. In addition, attached to his pleading are forms he states are copies of Annual Employment Reports for 1985 to 1993 filed jointly by WGBB(AM) and WBAB-FM. He argues that the forms indicate that WGBB(AM)/WBAB-FM have employed so few minorities relative to their presence in the labor force that they have inadequate EEO programs. Consequently, he requests that the assignment of WHFM(FM) to Liberty be denied.

III. DISCUSSION

3. Mr. Naylor has failed to establish party-in-interest status because he failed to file an affidavit with his pleading indicating that he is either a listener of or resident of the service area of WGBB(AM)/WBAB-FM. *See* 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Applications of Commonwealth Broadcasting of Northern California, et al.*, FCC 94-106 (released April 28, 1994). Accordingly, Mr. Naylor lacks standing to petition the assignment application and his pleading will be treated as an informal objection in accordance with 47 C.F.R. § 73.3587.

4. Furthermore, based on our review of the informal objection, we conclude that Mr. Naylor did not raise specific allegations of discrimination or violation of our EEO Rule, 47 C.F.R. § 73.2080, sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, as required by 47 U.S.C. § 309(d)(1). *See Astroline, supra. See also Applications of Heritage-Wisconsin Broadcasting Corp., et al.*, 8 FCC Rcd 5607 (1993) (WEMP/WMYX-FM); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). First, he offers no evidence to support his allegations of discrimination. Liberty's inquiry into his race and referral source without an interview do not, standing alone, raise a question or issue of discrimination. Even if taken as true, these allegations do not constitute a violation of our EEO Rule. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). Second, Mr. Naylor's EEO allegations against Liberty for actions taken at WGBB(AM)/WBAB-FM from 1985 to 1993 are based entirely on a period that is prior to Liberty's April 1, 1993, acquisition of the stations. Such activities, therefore, have no bearing on Liberty's qualifications.

IV. CONCLUSION

5. After reviewing all of the above, we find that the informal objection filed by David Naylor failed to show why grant of the assignment would be *prima facie* inconsistent with the public interest. He failed to show that Liberty Broadcasting of New York, Inc. discriminated against him at its station in Babylon, New York, or that Liberty violated the EEO Rule in its hiring practices. Consequently, we will dismiss Mr. Naylor's informal objection and grant the assignment application.

V. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the informal objection filed by David Naylor IS DISMISSED.

7. IT IS FURTHER ORDERED that the assignment application between Faircom Southampton, Inc. and Liberty Broadcasting of New York, Inc. for WHFM(FM) IS GRANTED.

8. This action is taken pursuant to delegated authority under Section 0.283(b)(1) of the Commission's Rules, 47 C.F.R. § 0.283(b)(1). Pursuant to Section 73.3526 of the Commission's Rules, 47 C.F.R. § 73.3526, WHFM(FM) is required to place this Memorandum Opinion and Order in its public file.

9. The Mass Media Bureau will send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties. Should they have any questions regarding this action they may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Assignment Applications of WGNA Broadcasting, Inc. to Assign the Licenses of WGNA(AM)/WGNA-FM, Albany, New York to Liberty Broadcasting of New York, Inc.	File Nos. BAL-940112GF and BALH-940112GG

MEMORANDUM OPINION AND ORDER

Adopted: June 17, 1994; Released: July 5, 1994

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. The Bureau has before it for consideration: (i) applications for assignment of license of Stations WGNA(AM)/WGNA-FM, Albany, New York, (File Nos. BAL-940112GF, BALH-940112GG) from WGNA Broadcasting, Inc. to Liberty Broadcasting of New York, Inc. (Liberty); (ii) a request by David Naylor for the Commission to reconsider the dismissal of his "petition to deny" the above-referenced application; and (iii) a joint opposition to Mr. Naylor's request filed by the assignor and assignee. On February 17, 1994, Mr. Naylor filed a pleading styled as a petition to deny the above-referenced assignment applications. By letter dated March 10, 1994, Mr. Naylor withdrew his pleading. By letter dated April 13, 1994, the Audio Services Division of the Mass Media Bureau dismissed his petition. By letter dated April 7, 1994, but received at the Commission on April 19, 1994, Mr. Naylor sought to rescind his withdrawal of the "petition to deny."

2. In his April 7, 1994, letter, Mr. Naylor states that he withdrew his pleading based on the advice of counsel for the NAACP and stated that he wished to "reactivate" the pleading because he no longer feels "comfortable or confident with" the NAACP's advice. We will regard the April 7th letter as a request for reconsideration of the dismissal. For the reasons listed below, we deny the request for reconsideration.

II. DISCUSSION

3. In his pleading styled as a petition to deny, Mr. Naylor states that he is a member of the NAACP and the National Black Media Coalition and has experience in radio and communications generally.[1] He states that he conducted a study of the hiring practices of 24 broadcast stations on Long Island, New York focusing on their employment of Blacks. Included in the study were WGBB(AM), Freeport, New York, and WBAB-FM, Babylon, New York, which are both owned by Liberty. As a result of his study, based in part on Annual Employment Reports filed prior to 1994 by WGBB(AM)/WBAB-FM, Mr. Naylor argues that Liberty has employed few minorities relative to its labor force and that Liberty violated the Commission's EEO Rule, 47 C.F.R. § 73.2080. Consequently, he requests that the assignment of WGNA(AM)/WGNA-FM to Liberty be denied.

4. In his original pleading, Mr. Naylor failed to establish party-in-interest status because he failed to file an affidavit with his pleading indicating that he is either a listener of or resident of the service area of WGBB(AM)/WBAB-FM. *See* 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Applications of Commonwealth Broadcasting of Northern California, et al.*, FCC 94-106 (released April 28, 1994). Accordingly, Mr. Naylor lacked standing to petition the assignment application and, if his pleading were to have been considered, it would have been treated as an informal objection in accordance with 47 C.F.R. § 73.3587. Because he lacked standing as a petitioner, he has no standing to file a petition for reconsideration. *See* 47 C.F.R. §§ 1.106, 73.3584. In addition, Mr. Naylor has failed to show good cause why his original pleading should be reinstated. Nor has he presented any change in facts or circumstances which have occurred since the time he orginally filed his informal objection. *See* 47 C.F.R. § 1.106(b)(2) and (c)(1).

5. Furthermore, based on our review of the informal objection, we conclude that Mr. Naylor did not raise specific allegations of violations of our EEO Rule sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, as required by 47 U.S.C. § 309(d)(1). *See Astroline, supra. See also Applications of Heritage-Wisconsin Broadcasting Corp., et al.*, 8 FCC Rcd 5607 (1993) (WEMP/WMYX-FM); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). Mr. Naylor's EEO allegations against Liberty for actions taken at WGBB(AM)/WBAB-FM prior to 1994 are based entirely on a period that is prior to Liberty's April 1, 1993, acquisition of the stations. Such activities, therefore, have no bearing on Liberty's qualifications.

III. CONCLUSION

6. After reviewing all of the above, we find that David Naylor failed to establish party-in-interest standing to file a petition to deny the assignment applications for WGNA(AM)/WGNA-FM. His informal objection to the assignments failed to show why grant of the assignments would be *prima facie* inconsistent with the public interest. In addition, Mr. Naylor failed to show good cause why he should be allowed to cancel his withdrawal of his informal objection. Consequently, we will dismiss Mr. Naylor's request for reconsideration of the dismissal of the informal objection and grant the assignment applications.

[1] Mr. Naylor, who resides in Holtsville, New York, applied unsuccessfully for employment at Liberty station WBAB-FM in Babylon, New York.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the request for reconsideration filed by David Naylor IS DISMISSED.

8. IT IS FURTHER ORDERED that the assignment applications between WGNA Broadcasting, Inc. and Liberty Broadcasting of New York, Inc. for WGNA(AM)/WGNA-FM ARE GRANTED.

9. This action is taken pursuant to delegated authority under Section 0.283(b)(1) of the Commission's Rules, 47 C.F.R. § 0.283(b)(1). Pursuant to Section 73.3526 of the Commission's Rules, 47 C.F.R. § 73.3526, WGNA(AM)/WGNA-FM are required to place this Memorandum Opinion and Order in their public file.

10. The Mass Media Bureau will send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties. Should any of the parties have any questions regarding this action they may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS File No. BPH-911114MS

LLOYD SANTIAGO-SANTOS AND LOURDES RODRIGUEZ BONET File No. BPH-911115MP

For Construction Permit for a New FM Station on Channel 293A in Culebra, Puerto Rico

ORDER

Adopted: June 24, 1994; Released: July 7, 1994

By the Review Board: MARINO (Chairman) and Greene.

1. The Review Board has before it for consideration a Joint Request for Approval of Settlement Agreement filed March 8, 1994, by the above-captioned applicants. The Commission's Mass Media Bureau submitted comments opposing the Agreement on April 28, 1994, and the applicants filed reply comments on May 9, 1994.

2. In an *Initial Decision*, 8 FCC Rcd 7920 (1993), Administrative Law Judge Joseph P. Gonzalez granted the application of Aurio A. Matos (Matos) for authority to construct a new FM station at Culebra, Puerto Rico, and denied the mutually exclusive application of Lloyd Santiago-Santos and Lourdes Rodriguez Bonet (Santos-Bonet). The parties filed exceptions and replies. In a January 28, 1994 statement for the record, Matos reported that the United States Fish and Wildlife Service had recently informed him that it would not grant the Special Use Permit necessary for the effectuation of his site proposal. Also on that date, the Bureau filed a motion to reopen the record and to enlarge the issues to determine whether Matos timely reported the loss of his transmitter site and whether he has reasonable assurance of the availability of the site. Matos opposed the motion on February 7, 1994, and has since petitioned for leave to amend to a new site. *See* Matos Petitions for Leave to Amend, filed February 7, April 14, May 5, and May 23, 1994.[1]

3. The settlement agreement contemplates the grant of the Matos application, as amended, and the dismissal of the Santos-Bonet application and is conditioned on the denial of the Bureau's motion to reopen and enlarge. In return, the following consideration is offered: Matos will pay Santos-Bonet $50,000, which amount is alleged to be less than its legitimate and prudent expenses of $50,716.98. *See* Settlement Agreement, Exh. A. In addition, the parties have agreed to execute consulting agreements worth an additional $50,000 whereunder Matos will hire Lloyd Santiago-Santos and Lourdes Rodriguez Bonet "as part-time consultants to assist in the construction and initial operation of the new Culebra station." *Id.* at 2. Movants propose that Mr. Santiago-Santos, who has broadcast management experience, will serve as operations consultant while Ms. Bonet, who possesses a background in business and accounting, will be a business and financial consultant. Each consulting agreement will be for a two-year term with annual compensation of $12,500. Matos will place $25,000 in escrow for each year of the contract. *See id.* ¶ 6.

4. Upon reviewing additional supporting documentation provided by the applicants, which materials are not in the record nor before the Board, the Bureau opines that "the settlement agreement is not grantable in its present form." Bureau Comments at 3. In addition to maintaining that the record should be reopened to try qualifying issues against Matos,[2] the Bureau objects to that portion of the settlement agreement relating to the hiring of Santiago-Santos and Bonet as consultants -- apparently because the agreements are still in draft form (*id.* at 4):

> in the absence of any binding [consulting and escrow] agreements, the Board is unable to conclude that the proposed consulting arrangement -- through which Santiago & Rodriguez would reap an additional $50,000 over and above their legitimate and prudent expenses -- is not a sham designed to skirt the Commission's limitation on reimbursable expenses.

5. In reply, Movants describe their informal dealings with Bureau counsel, including their provision of drafts of the agreements for its review, and their efforts to obtain its advice on the agreements in advance of their execution. Reply Comments at 3-4. Matos and Santos-Bonet claim they are "fully prepared" to execute the agreements as drafted, but state their continuing preference to hear first from the Bureau "in an effort to expedite the resolution of this proceeding." *Id.* at 5. Finally, they state (*id.* at 5-6):

> If the Bureau elects not to comment on the substance of the Agreements, and the Review Board decides that these Agreements must be filed in order for the Board to rule of [sic] the Settlement Agreement, then the Applicants will execute the Agreements without the prior approval of the Bureau.

6. We agree with the Bureau insofar as it argues that Movants have failed to place a grantable settlement agreement before the Board. The settling parties are responsible for filing all necessary documentation to support their settlement agreement and to demonstrate that their pro-

[1] Although the Bureau has found Matos' new site proposal to be technically acceptable, it maintains that Matos lacks good cause to amend to a new site. Bureau Comments, filed Feb. 15 & June 2, 1994.

[2] The Bureau, which filed its comments on the settlement agreement while Matos was still in the process of finalizing his new site proposal (and securing the approval of the Federal Aviation Administration), further objects to the settlement agreement on the theory that Matos lacks a viable transmitter site. Bureau Comments at 3-4.

posal complies with the Commission's rules and policies. They cannot avoid this responsibility by relying on Bureau counsel, or any other entity, to ensure that their proposal meets the threshold requirements. Matos and Santos-Bonet will accordingly be ordered to submit all documents supporting their proposed settlement agreement and required by the Commission's rules, specifically including the final consulting agreements and the escrow agreement referenced in the settlement agreement. The Bureau may submit comments on that filing.

7. ACCORDINGLY, IT IS ORDERED, That Aurio A. Matos and Lloyd Santiago-Santos and Lourdes Rodriguez Bonet ARE DIRECTED TO FILE supporting documentation in accordance with paragraph 6 of this *Order* within fifteen (15) days of its release date; and that the Mass Media Bureau MAY FILE responsive comments within ten (10) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-71

In re Applications of:

SANTA MONICA COMMUNITY COLLEGE DISTRICT (hereafter "SMCCD") — File No. BPED-920305ME

For Construction Permit for a New Noncommercial FM Station on Channel 204B in Mojave, California

LIVING WAY MINISTRIES (hereafter "Living Way") — File No. BPED-920511MC

For Construction Permit for a New Noncommercial FM Station on Channel 205A in Lancaster, California

HEARING DESIGNATION ORDER

Adopted: June 24, 1994; Released: June 27, 1994

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications, one for a new noncommercial educational ("NCE-FM") FM station serving Mojave, California, and one for a new NCE-FM station serving Lancaster, California.

2. *SMCCD.* The SMCCD application appears to be in violation of the 47 C.F.R. § 73.3513(a)(4) requirement that a member of the governing board of an institution sign the application and associated amendments. The members of the SMCCD governing board, who are authorized to sign any filings, are listed in Section II, Exh. 2 of the application. This list does not include Thomas J. Donner, Deputy Superintendent, the signatory of the SMCCD application and amendments. Therefore, SMCCD must amend Section VII, the certification page, of the application and must ratify its previous amendments by including a signature which complies with the provisions of Section 73.3513.

3. *Share-time Arrangement.* Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at anytime during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

4. *Section 307(b) and Contingent Comparative Issues.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

5. *Air Hazard Issue.* Attempts to obtain FAA clearance through the Commission's Support Services Branch as to whether the antennas proposed by SMCCD and Living Way would constitute a hazard to air navigation have been unsuccessful. Accordingly, an issue will be specified with respect to SMCCD and Living Way, and the FAA made a party to the proceeding.

6. *Comparative Coverage.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

7. *Late-Filed Amendments.* SMCCD filed amendments to its application on March 5, 1993 and June 17, 1994, after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. Section 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

2. To determine in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine whether there is a reasonable possibility that the tower heights and locations proposed by SMCCD and Living Way would constitute a hazard to air navigation.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That SMCCD shall within 30 days of the release date hereof file the amendment and ratification called for in paragraph 2, *supra*, and provide a copy to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That the amendments filed on March 5, 1993 and June 17, 1994 by SMCCD ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-70

In the Matter of

Amendment of Section 73.202(b) RM-8474
Table of Allotments,
FM Broadcast Stations.
(Moncks Corner and Kiawah Island,
South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1994; Released: July 5, 1994

Comment Date: August 26, 1994
Reply Comment Date: September 12, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ceder Carolina Limited Partnership ("petitioner"), permittee of Station WJYQ(FM), Channel 287C3, Moncks Corner, South Carolina, proposing the substitution of Channel 288C2 for Channel 287C3 and the reallotment of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, and the modification of Station WJYQ(FM)'s construction permit accordingly. Petitioner states its intention to apply for Channel 288C2 at Kiawah Island, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC RCd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). In this regard, petitioner advises that the requested reallotment to Kiawah Island is mutually exclusive with the present allotment of Channel 287C3 at Moncks Corner. In support of its proposal, petitioner states that the reallotment of Channel 288C2 from Moncks Corner (population 5,607)[1] to Kiawah Island (population 718), South Carolina, would provide Kiawah Island with its first local aural transmission service and would not deprive Moncks Corner of its sole local aural transmission service.[2] Although petitioner recognizes that there may be some theoretical loss to the northern part of Moncks Corner and areas in northern Berkeley County, South Carolina, the reallotment will enable Station WJYQ(FM) to provide better than 1.0 mV/m coverage of Moncks Corner and city grade coverage over all of Kiawah Island. Further, petitioner notes that neither Moncks Corner nor Kiawah Island is located in the adjacent Charleston Urbanized Area. Therefore, since Station WJYQ(FM) would provide service to the Urbanized Area if located in Moncks Corner or Kiawah Island, petitioner argues that the reallotment should not be considered as a move into an Urbanized Area since the station presently serves the Charleston Urbanized Area and would continue to do so. Petitioner also states that the reallotment would allow Station WJYQ(FM) to provide service to 468,867 persons as compared to the present Class A service to 226,341 persons. Petitioner asserts that the reallotment would provide additional service to 250,238 persons, and that while 7,712 persons would lose service from Station WJYQ(FM), those persons in the loss area would continue to receive reception service from seven other FM stations. We note, however, that petitioner does not describe the number of reception services that currently serve the gain area or whether the gain area will include any underserved areas. Petitioner is requested to address these issues in its comments.

3. We believe the public interest would be served by proposing the substitution of Channel 288C2 for Channel 287C3 and the reallotment of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, since it could provide Kiawah Island with its first local aural transmission service and enable Station WJYQ(FM) to expand its service area. An engineering analysis has determined that Channel 288C2 can be allotted to Kiawah Island in compliance with the Commission's minimum distance separation requirements with a site restriction of 13 kilometers (8.1 miles) north at petitioner's requested site.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Moncks Corner, South Carolina	287C3	--
Kiawah Island, South Carolina	--	288C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

[1] Population figures taken from the 1990 U.S. Census.
[2] Moncks Corner is served by Station WMCJ(AM)
[3] The coordinates for Channel 288C2 at Kiawah Island are North Latitude 32-43-38 and West Longitude 80-00-05. We note that the proposed coordinates for Channel 288C2 at Kiawah Island are short-spaced to the construction permit site for Station WONO(FM), Channel 287A, Walterboro, South Carolina. However, the construction permit for Station WONO(FM) was modified to specify operation on Channel 229A in the context of MM Docket No. 91-127. *See* 7 FCC Rcd 6522 (1992). On October 13, 1993, a license (File No. BLH-930303KE) was granted to Station WONO(FM) specifying operation on Channel 229A at Walterboro.

6. Interested parties may file comments on or before **August 26, 1994**, and reply comments on or before **September 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Nancy C. Ory
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-219

In the Matter of

Amendment of Section 73.202(b), RM-7729
Table of Allotments,
FM Broadcast Stations.
(Brillion, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1994; Released: July 5, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4500 (1991), proposing the substitution of Channel 298C3 for Channel 298A at Brillion, Wisconsin, and modification of the license for Station WEZR(FM), to specify operation on Channel 298C3.[1] The *Notice* was issued in response to a petition filed by Brillion Radio Company ("petitioner"). Petitioner filed comments and reply comments reaffirming its intention to file an application for Channel 298C3.[2] An unacceptable counterproposal was filed by WinCom Wisconsin Limited Partnership ("WinCom").[3]

2. We believe the public interest would be served by substituting Channel 298C3 for Channel 298A at Brillion, Wisconsin, in order to provide the community with a wide coverage area station. As indicated in the *Notice*, Channel 298C3 can be allotted to Brillion consistent with the Commission's spacing requirements at petitioner's specified site.[4] We will authorize a modification of petitioner's license for Station WEZR(FM), Channel 298A, Brillion, to specify operation on Channel 298C3 in accordance with section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 19, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Brillion, Wisconsin	298C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WEZR(FM), Brillion, Wisconsin, IS MODIFIED to specify operation on Channel 298C3, subject to the following conditions:

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[1] The construction permit for Station WEZR(FM) was modified to specify operation on Channel 298A in lieu of Channel 242A in MM Docket 89-282, effective July 1, 1991. *See* 6 FCC Rcd 2624 (1991). Station WEZR(FM) is now licensed on Channel 298C3 (BLH-930317KA).

[2] Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. We do note that petitioner's request was signed and an address provided but it failed to verify the statements contained in the petition. However, as Channel 298C3 can be allotted to Brillion without prejudice to any other pending request for allotment proposal, we do not believe the petitioner's failure to verify its statement should result in the severe penalty of depriving Brillion of expanded FM broadcast service. Nevertheless, our determination should not be interpreted as exempting parties from complying with the requirements of Section 1.52 of the Commission's Rules. In fact, had we been unable to accommodate this proposal without prejudice to any other pending request, the proposal may have been dismissed based upon the petitioner's failure to abide by the requirements of Section 1.52 of the Commission's Rules initially, or to remedy the omission in comments in response to the *Notice*.

[3] In its comments, WinCom states that petitioner's proposal is short-spaced to its counterproposal filed in MM Docket No. 89-486 in which WinCom proposed, *inter alia*, the allotment of Channel 295C3 to Ashwaubenon, Wisconsin. WinCom also notes that petitioner's proposal is short-spaced to WinCom's proposal to allot Channel 297C3, rather than 279C3 to Menominee, Michigan, in MM Docket No. 90-139. Because the Brillion substitution proposal is in conflict with these proceedings, WinCom believes that the Brillion substitution constitutes an untimely counterproposal. WinCom notes that the Commission's staff has not placed its counterproposal in MM Docket No. 89-486 on public notice. WinCom believes that the absence of public notice is an oversight and, therefore, resubmits the counterproposal in this proceeding in order to protect the allotments proposed as a part of the MM Docket Nos. 89-486 and 90-139 proceedings.

The Brillion substitution is not in conflict with WinCom's filing in MM Docket No. 89-486, as WinCom's counterproposal was never accepted in that proceeding. In the *Report and Order* in MM Docket No. 89-486, 6 FCC Rcd 7142 (1991), we stated that WinCom's counterproposal was unacceptable because it constituted an untimely counterproposal, and violated the Commission's policy limiting the number of channel substitutions in an allotment proceeding. Therefore, acceptance of the proposal presented herein was proper. On September 2, 1993, WinCom filed a request to withdraw its Petition for Reconsideration. A *Memorandum Opinion and Order* was adopted December 9, 1993. As a result, we need not consider WinCom's counterproposal herein, or petitioner's responsive comments.

[4] The coordinates for Channel 298C3 at Brillion, as proposed in the *Notice*, are 44-19-10 North Latitude and 87-57-30 West Longitude. We note that our engineering analysis indicates that at this site, a tower greater than the reference height for a C3 facility may be necessary. *See* Section 73.211(b)(2) of the Commission's Rules.

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Brillion Radio Company, licensee of Station WEZR(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Stanley S. Neustadt

Cohn and Marks

1333 New Hampshire Avenue, N.W., Suite 600

Washington, D.C. 20036

(Counsel for WinCom Wisconsin Limited Partnership)

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-307

In the Matter of

Amendment of Section 73.202(b), RM-8386
Table of Allotments,
FM Broadcast Stations.
(Jensen Beach and Melbourne)
Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1994; Released: July 5, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 149 (1994), issued in response to a petition jointly filed by HLG, Inc. ("HLG"), licensee of Station WHLG(FM), Channel 272A, Jensen Beach, Florida, and City Broadcasting Co. ("City"), licensee of Station WGGD(FM), Channel 272A, Melbourne, Florida ("jointly referred to as "petitioners"), requesting the substitution of Channel 272C3 for Channel 272A at Jensen Beach, and the modification of Station WHLG(FM)'s license to specify the higher class channel. In order to accomplish the upgrade at Jensen Beach, the *Notice* also proposed the substitution of Channel 236A for Channel 272A at Melbourne, Florida, and the modification of Station WGGD(FM)'s license to specify operation on Channel 236A. Petitioners filed joint comments restating their intentions to apply for the respective channels, if allotted.[1]

2. We believe the public interest would be served by substituting Channel 272C3 for Channel 272A at Jensen Beach, Florida, since it could provide the community with a wide coverage area FM service. In addition, the substitution of Channel 236A for Channel 272A at Melbourne, Florida, will allow Station WGGD(FM) to operate at 6 kilowatts. Channel 272C3 can be allotted to Jensen Beach in compliance with the minimum distance separation requirements of the Commission's Rules at the licensed transmitter site.[2] Channel 236A can be allotted to Melbourne in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 6.4 kilometers (4 miles) north of the community,[3] in order to avoid a short-spacing to Station WWRM(FM), Channel 235C, Tampa, Florida. The substitution at Jensen-Beach is contingent on Station WAVW(FM), Vero Beach, Florida, moving to Channel 269C3 as ordered in MM Docket 89-456.[4] Therefore, issuance of a construction permit or license for Channel 272C3 at Jensen Beach may be withheld until Station WAVW(FM) at Vero Beach is licensed on Channel 269C3. We also note that the allotment of Channel 272C3 at Jensen Beach, Florida is located within 80 kilometers of the Federal Communication Commission's monitoring station at Vero Beach, Florida. Therefore, HLG should refer to the provisions of Section 73.1030(c)(1)-(5) of the Rules governing protection of Federal Communications Commission Monitoring Stations.

3. Commission policy requires reimbursement to affected stations for the reasonable cost associated with changing frequencies. HLG has stated its intention to reimburse City, the licensee of Station WGGD(FM), Melbourne, Florida, for the costs associated with relocating its station in order to accommodate the upgrade at Jensen Beach, and the licensee of Station WGGD(FM) has consented to the frequency change and site relocation.

4. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WGHL(FM) to specify operation on Channel 272C3 at Jensen Beach, Florida. We are also modifying the license for Station WGGD(FM) to specify operation on Channel 236A at Melbourne, Florida.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective August 19, 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Jensen Beach, Florida	272C3
Melbourne, Florida	236A, 292A, 296C1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHLG(FM), Jensen Beach, Florida, IS MODIFIED, to specify operation on Channel 272C3 in lieu of Channel 272A, subject to the following conditions:

[1] City filed comments requesting that the record correctly reflect Robert A. Depont, Attorney at Law, 140 South Street, P.O. Box 386, Annapolis, MD 21404 as Counsel for City Broadcasting Co., Inc. We issued an *Erratum* correctly identifying legal counsel for City.

[2] The coordinates for Channel 272C3 at Jensen Beach are 27-12-53 North Latitude and 80-15-24 West Longitude.

[3] The coordinates for Channel 236A at Melbourne are 28-08-08 North Latitude and 80-35-35 West Longitude.

[4] A *Report and Order* was adopted on September 19, 1990, in MM Docket 89-456, granting the substitution of Channel 269C3 for Channel 269A at Vero Beach, Florida. This action became effective November 16, 1990. See 5 FCC Rcd 5710 (1990). An application (BPH910213IC) to implement the upgrade on Channel 269C3 is pending.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WGGD(FM), Melbourne, Florida, IS MODIFIED, to specify operation on Channel 236A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, HLG, Inc., licensee of Station WHLG(FM), Jensen Beach, Florida, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee for Station WGGD(FM) as follows: Robert A. DePont, Attorney at Law, 140 South Street, P.O. Box 386, Annapolis, MD 21404 (Counsel for City Broadcasting Co., Inc.) and Media VI, A Florida General Partnership, P.O. Box 39, Vero Beach, Florida 32961 (licensee of Station WAVW(FM)).

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

ORDER ON REMAND

Adopted: June 16, 1994; Released: July 5, 1994

By the Commission: Commissioners Ness and Chung not participating.

1. This proceeding addresses whether and to what extent the Virgin Islands Telephone Corporation (Vitelco) is subject to refund liability because it charged unreasonably high rates for switched access and special access services from January 2 to June 30, 1990. In the *Vitelco Final Order*,[1] we required Vitelco to issue refunds, but that Order was reversed and remanded by the Court of Appeals.[2]

2. On December 15, 1989, Vitelco filed tariff revisions under Transmittal No. 6 to increase its switched and special rate increases on a six-month interim basis. Vitelco anticipated a 24 percent decrease in demand as a result of Hurricane Hugo, which Vitelco stated had destroyed 75 percent of its interstate access lines.[3] The Bureau permitted these rates to take effect on January 2, 1990, after a one day suspension, subject to an accounting order and an investigation into the reasonableness of the interim rates.[4] In the investigation, we concluded that Vitelco's interim rates were unjust and unreasonable for the period those rates were in effect, January 2 to June 30, 1990, and ordered Vitelco to refund the amounts in excess of the rates that had previously been in effect.[5]

3. Vitelco petitioned the Court of Appeals for review of the *Vitelco Final Order*, arguing that the Commission was arbitrary and capricious in evaluating Vitelco's interim rates during the six-month period they were in effect rather than the two-year monitoring period established in the Commission's rate of return prescription rules.[6] Vitelco also petitioned the Commission for stay of the refund requirement of the *Vitelco Final Order* pending the Court's ruling on Vitelco's petition for review. We granted the stay on the condition that Vitelco place the amount to be refunded in an escrow account.[7] The Court held that the Commission erred in evaluating Vitelco's interim rates outside the context of the two-year monitoring period, and remanded the case to the Commission to recalculate Vitelco's earnings based on the full monitoring period of January 1, 1989, to December 31, 1990.[8]

4. In light of the Court's decision, we have concluded that it is no longer in the public interest to pursue this investigation of Vitelco's interim rates for the January to June 1990 time period.

5. Accordingly, IT IS ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 90-124 IS TERMINATED.

6. IT IS FURTHER ORDERED that the requirement that Virgin Islands Telephone Corporation maintain an escrow account, imposed by the Commission in CC Docket No. 90-124, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, 6 FCC Rcd 7350 (Com. Car. Bur. 1991) (*Vitelco Final Order*).

[2] Virgin Islands Telephone Corp. v. FCC, 989 F.2d 1231 (D.C. Cir. 1993) (Vitelco v. FCC).

[3] Virgin Islands Telephone Corporation, 5 FCC Rcd 112 (Com. Car. Bur. 1989) (*Vitelco Investigation Order*).

[4] *Id.* The Bureau designated issues in this investigation on March 6, 1990, in the *Vitelco Designation Order*. Virgin Islands Telephone Corporation, CC Docket No. 90-124, 5 FCC Rcd 1622 (Com. Car. Bur. 1990), *modified* 5 FCC Rcd 2525 (Com. Car. Bur. 1990) (*Vitelco Designation Order*).

[5] *Vitelco Final Order*, 6 FCC Rcd at 7352.

[6] Vitelco v. FCC, 989 F.2d at 1237. *See* Section 65.701 of the Commission's Rules, 47 C.F.R. § 65.701.

[7] Virgin Islands Telephone Corporation, CC Docket No. 90-124, 7 FCC Rcd 4235 (Com. Car. Bur. 1991) (*Vitelco Stay Order*). In a companion Order, we dismissed Vitelco's late filed petition for reconsideration of the *Vitelco Final Order*. Virgin Islands Telephone Corporation, CC Docket No. 90-124, 7 FCC Rcd 4238 (Com. Car. Bur. 1991) (*Vitelco Reconsideration Order*), *aff'd* Vitelco v. FCC, 989 F.2d at 1236-37.

[8] Vitelco v. FCC, 989 F.2d at 1240.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-58

In the Matter of

Amendment of Part 13 of the
Commission's Rules to Provide
Temporary Conditional Operating
Authority for Commercial Radio
Operator License Applicants.

NOTICE OF PROPOSED RULE MAKING

Adopted: June 13, 1994; Released: July 6, 1994

Comment Date: September 1, 1994
Reply Comment Date: October 1, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. Persons who have passed the required examinations and applied for commercial radio operator licenses often need their licenses immediately as a condition of employment. In this *Notice of Proposed Rule Making* (*Notice*), therefore, we propose to serve this important segment of the public by amending the rules to authorize them to perform the functions of a commercial radio operator on a temporary and conditional basis while awaiting their licenses.

II. BACKGROUND

2. A commercial radio operator license, certificate or permit (license) is required to be held by a person who operates stations in a number of radio services. To qualify for certain of these licenses,[1] an applicant must pass an examination(s) that is administered by one of the nine Commission-certified Commercial Operator License Examination (COLE) Managers. Within 10 days of completion of an examination element(s), the COLE Manager must issue a Proof-of-Passing Certificate (PPC) to an examinee who scores a passing grade on an examination element. When the examinee is credited for all examination elements required for the commercial operator license sought, the examinee applies to the Commission for the license. The Commission then processes the application and, if the applicant is fully qualified, grants the license.[2] Total processing time may be as much as eight weeks.

III. DISCUSSION

3. We are dedicated to providing better and friendlier service to our customers. One significant way we can further this goal is by permitting applicants who have passed the qualifying examinations and applied for a commercial radio operator license to perform the functions of a commercial radio operator prior to receiving the Commission license. This would be a significant benefit to persons who must have the license as a condition of employment by allowing them to start work immediately. Providing for such temporary conditional operating authority would produce a secondary benefit by likely applicants receiving their Commission-issued licenses sooner because there would be a reduction in the number of inquiries to the processing staff regarding the status of pending applications. Answering such inquiries diverts resources from the primary task of processing license applications.

4. Further, there is ample precedent for enacting rules that provide for conditional operating authority pending final grant of an application. For example, we previously have adopted rules to permit applicants in the Citizens Band Radio Service,[3] the Maritime Services,[4] and the Private Land Mobile Radio Services[5] to engage in temporary station operation pending final grant of their applications. In those instances, the Commission found that such a procedure would advance significant public interest objectives. For these reasons, we propose to amend Sections 13.9 and 13.13 of the Commission's Rules, 47 C.F.R. §§ 13.9 and 13.13, to provide temporary conditional operating authority to successful examinees upon properly filing an application with the Commission.[6] This proposed temporary operating authority, however, would not apply to any person who has previously had a commercial radio operator license revoked, suspended, or is the subject of an ongoing suspension proceeding. In addition, the proposed rules provide that the Commission, in its discretion, may cancel the temporary conditional operating authority without a hearing, if the need for such action arises.

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[1] The types of commercial operator licenses are: Restricted Radiotelephone Operator Permit (examination not required), Marine Radio Operator Permit, General Radiotelephone Operator License, Global Maritime Distress and Safety System (GMDSS) Radio Operator's License, GMDSS Radio Maintainer's License, and First, Second, and Third Class Radiotelegraph Operator's Certificates. The Ship Radar Endorsement also requires examination. *See* Section 13.7 of the Commission's Rules, 47 C.F.R. § 13.7.

[2] Section 1.84 of the Commission's Rules, 47 C.F.R. § 1.84, states that upon acceptance of an application for a commercial radio operator license filed in accordance with Part 13 of the Commission's Rules, a commercial radio operator license will be issued to all qualified and eligible applicants. The grant of an application that includes all necessary documentation is routine.

[3] 41 Fed. Reg. 15849 (1976).

[4] 70 FCC 2d 863 (1979).

[5] Conditional Authorization Procedure for Proposed Private Land Mobile Radio Service Stations, 4 FCC Rcd 8280, 8283 (1989).

[6] We propose to limit the temporary authority to 90 days because a full-term license would normally be issued within that time. It is an indication that the application was not received for processing, or the application is in some way defi-

5. For purposes of making log entries,[7] we propose that a commercial radio operator exercising temporary conditional operating authority would enter the PPC[8] serial number and date of issue in place of the FCC-issued license serial number and expiration date. Possession of the PPC document would activate the operating authority of proposed Sections 13.9(d) and 13.13(d) and would thereby serve in the stead of the license temporarily and conditionally. This procedure would be verifiable and simple to implement. The procedure that we are proposing should be viewed as yet another step in creating a government agency that works better and costs less.[9]

6. In accordance with the foregoing discussion, we propose to amend the commercial radio operator rules to allow persons who pass the necessary examinations and file with the Commission an application for a new commercial radio operator license to perform the duties of a commercial radio operator pending Commission action on their application. Comments are invited on this proposal.

IV. PROCEDURAL MATTERS

7. Initial Regulatory Flexibility Analysis

Reasons for Action:

Objectives: This rule making proceeding is initiated to obtain comments concerning proposed rule changes to Part 13 of the Rules to permit a person who has passed the examinations necessary to qualify for a commercial radio operator license, but who has not yet received the license, to temporarily and conditionally perform the functions of a commercial radio operator.

Legal Basis: The proposed action is authorized under Sections 4(i), 303(b), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b), (g), and (r).

Reporting, Recordkeeping and Other Compliance Requirements: None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: Any rule changes adopted as a result of this proceeding may affect various small entities that require an individual to hold a commercial radio operator license as a condition of employment. Potentially, small entities could hire commercial radio operator licensees sooner than under present licensing procedures.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The Notice solicits comments dealing with and addressing the proposed action, and the Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

8. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

9. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **September 1, 1994**, and reply comments on or before **October 1, 1994**. To file formally in this proceeding, you must file an original and four copies of all comments, and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number, **PR Docket No. 94-58**, is specified in the heading. You should send comments and reply comments to: Office of the Secretary, Mail Stop Code 1170, Federal Communications Commission, Washington, D. C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N. W., Washington, D.C. 20554.

10. *Authority.* Authority for issuance of this *Notice* is contained in Sections 4(i), 303(b), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b), (g), and (r).

11. For further information, contact the Personal Radio Branch, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 13 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 13 would continue to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

1. Section 13.9 is revised by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and adding a new paragraph (d) to read as follows:

cient, when a license is not issued within 90 days.

[7] *See* Section 13.19 of the Commission's Rules, 47 C.F.R. § 13.19.

[8] Part 13 requires that the applicant submit the application to the Commission after obtaining a proof-of-passing certificate from a commercial operator license examination manager for any required examination elements. *See* Section 13.9(c).

[9] Vice President Al Gore, Report of the National Performance Review, From Red Tape to Results: Creating a Government That Works Better and Costs Less (1993). The Vice President's Report stresses putting people first. Serving customers and cutting costs are two of its key principles. This *Notice* embraces these principles by seeking ways to provide commercial radio operator customers with faster and better service.

§ 13.9 Eligibility and application for new license or endorsement.

* * * * *

(d) Provided that a person's commercial radio operator license was not revoked, or suspended, and is not the subject of an ongoing suspension proceeding, a person who has properly filed with the FCC an application for a commercial radio operator license which has not yet been acted upon and who holds a PPC(s) indicating that he or she passed the necessary examination(s) within the previous 365 days is authorized to exercise the rights and privileges of the operator license for which the application is filed. This authority is valid for a period of 90 days from the date the application is filed. The FCC, in its discretion, may cancel this temporary conditional operating authority without a hearing.

* * * * *

2. Section 13.13 is revised by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and adding a new paragraph (d) to read as follows:

§ 13.13 Application for a renewed or modified license.

* * * * *

(d) Provided that a person's commercial radio operator license was not revoked, or suspended, and is not the subject of an ongoing suspension proceeding, a person holding a General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, GMDSS Radio Operator's License, or GMDSS Radio Maintainer's License, who has properly filed with the FCC an application for another commercial radio operator license which has not yet been acted upon and who holds a PPC(s) indicating that he or she passed the necessary examination(s) within the previous 365 days is authorized to exercise the rights and privileges of the license for which the application is filed. This authority is valid for a period of 90 days from the date the application is filed. The FCC, in its discretion, may cancel this temporary conditional operating authority without a hearing.

* * * * *

3. Section 13.19 is amended by revising paragraphs (b)(3) and (c) to read as follows:

§ 13.19 Operator's responsibility.

* * * * *

(b) ***

(3) The class, serial number and expiration date of the license when the FCC has issued the operator a license, or the PPC serial number(s) and date(s) of issue when the operator is awaiting FCC action on an application:

(c) When the operator is on duty and in charge of transmitting systems, or performing service, maintenance or inspection functions, the license or permit document, or a photocopy thereof, or a copy of the application and PPC(s) properly filed with the FCC, must be posted or in the operator's personal possession, and available for inspection upon request by a FCC representative.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-143

In the Matter of

Amendment of the Maritime Services Rules (Part 80) and Aviation Services Rules (Part 87) to require registration of 406 MHz radiobeacons	RM-8008

REPORT AND ORDER

Adopted: June 13, 1994; Released: July 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. This Report and Order amends Parts 80 and 87 of the Rules, 47 C.F.R. Parts 80 and 87, to require registration of emergency position indicating radiobeacons (EPIRBs) and emergency locator transmitters (ELTs)[1] operating on the frequency 406.025 MHz with the National Oceanic and Atmospheric Administration (NOAA).

II. BACKGROUND

2. The United States, Canada, France and Russia operate COSPAS/SARSAT[2] satellites which are used to detect and locate ships and aircraft in distress. The COSPAS/SARSAT system is used to detect and locate distress signals from older EPIRBs and ELTs that use analogue signals and operate on the frequencies 121.500/243.000 MHz as well as newer EPIRBs and ELTs that use digital signals and operate on 406.025 MHz.[3] EPIRBs and ELTs that operate on 406.025 MHz transmit a signal that contains, among other things, an identification number that specifically identifies the beacon to aid in search and rescue (SAR) operations. Further, 406 MHz distress signals can be stored on-board COSPAS/SARSAT satellites and then later retransmitted to a ground station thus eliminating the "blind spots" that exist with the older EPIRBs and ELTs.

3. NOAA maintains a database for 406 MHz EPIRBs that contains more than 13,400 unique identification codes and registration information. Registration by beacon owners in this database is strongly encouraged through education programs by the United States Coast Guard (Coast Guard) and NOAA, but is presently voluntary. Manufacturers are required by rule[4] to program into each EPIRB or ELT a unique code and provide an equipment plate or label on each 406 MHz EPIRB or ELT displaying the unique NOAA identification code and registration instructions. Manufacturers must also include a pre-paid, pre-addressed post card soliciting the owner's name and address, telephone number, the type of ship or aircraft and the unique identification code for registration in NOAA's database. When the distress signal is relayed to a rescue coordination center (RCC) the registration information is available to SAR personnel.

4. On May 11, 1993, the Commission adopted a *Notice of Proposed Rule Making* (Notice)[5] proposing to require registration of emergency radiobeacons, both EPIRBs and ELTs, operating on the frequency 406.025 MHz with the National Oceanic and Atmospheric Administration (NOAA). In response to the *Notice* we received ten comments and one reply comment.[6] All the commenters favor adopting the rule amendment substantially as proposed.

III. DISCUSSION

5. The commenters overwhelmingly support requiring mandatory registration of EPIRBs and ELTs with NOAA. The National Aeronautics and Space Administration (NASA), developer of the SARSAT system, states that registration is a key part of the 406 MHz system. Various circumstances, such as a crash or sudden sinking resulting in disabling the beacon, blockage of the beacon signal by terrain or structures, or a satellite pass that occurs near the horizon of the distress location can result in a distress alert but insufficient data to obtain a location.[7] Armed with registration information, SAR personnel can call the owner or other point-of-contact provided in NOAA's database. Knowledge of details such as the type and size of the vessel or aircraft, the number of people in distress, and the itinerary of the vessel or aircraft can help SAR personnel to react in a timely and effective manner.[8] In the case of nondistress or inadvertent activations, the registration in-

[1] Emergency position indicating radiobeacon stations are small battery powered transmitters used to send a distress signal that is used as an alerting signal and to assist search and rescue personnel. In the United States such beacons are named emergency locator transmitters (ELTs) when carried on an aircraft and emergency position indicating radiobeacons (EPIRBs) when carried on ships. ELTs and EPIRBs operate on the same internationally allocated frequencies and transmit identical distress signals.

[2] COSPAS is an acronym for a Russian phrase meaning space system for search and distress vessels. SARSAT stands for search and rescue satellite-aided tracking.

[3] Older EPIRBs and ELTs transmit signals on 121.500/243.000 MHz that provide distress alerting and guidance (homing) assistance in emergency situations. The 121.500 MHz signal can only be detected and relayed to search and rescue (SAR) personnel when a COSPAS/SARSAT satellite is in communications range of both the 121.500 MHz beacon and a ground station known as a Local User Terminal (LUT). There are, therefore, "blind spots" where 121.500 MHz distress signals can not be relayed to a LUT.

[4] *See* Sections 80.1061(e) and 87.199(e), 47 C.F.R. §§ 80.1061(e) and 87.199(e).

[5] PR Docket No. 92-143, 8 FCC Rcd 3591 (1993).

[6] The following parties filed comments: Air Transport Association, America House, the BOC Challenge, Cruising World, Department of the Air Force, National Aeronautics and Space Administration, National Oceanic and Atmospheric Administration, Mary and Frank Plant, Rodger Martin Yatch Designs, RP Associates, Inc. The Coast Guard filed reply comments.

[7] The 406 MHz satellites require at least three valid transmissions to compute location information on any beacon in any part of the globe. NASA at 2.

[8] Air Force at 1. NOAA at 2.

formation allows SAR personnel to evaluate the situation with a telephone call to the owner or point-of-contact and may eliminate the need to launch costly SAR equipment and personnel to determine the nature of the distress.[9]

6. NASA notes that geostationary satellites planned for the mid 1990's will be capable of receiving 406.025 MHz distress signals. These satellites will serve as an adjunct to the COSPAS/SARSAT system of polar orbiting satellites and will offer potentially significant improvements in the identification of distress situations to global SAR forces.[10] These geostationary satellites will be able to receive a 406.025 MHz distress signal almost instantly, but will not provide position information.[11] Because detecting an alert without position or other identifying information is useless, NASA stresses the importance of mandatory registration, which might provide enough additional information to enable a quick response.[12]

7. Air Transport Association (ATA) states that because ELTs are transferred between aircraft owned by the same company for maintenance and other purposes, that reporting such changes to NOAA will be an administrative burden. They propose ELTs be registered to airline carriers rather than to specific airframes and stated that SAR personnel could contact the airline that owns the ELT for help in identifying the nature of the activation and the individual aircraft identification.[13] The Coast Guard does not object to this proposal provided that the airline carrier provide a 24-hour point of contact that is able to correlate the alert positions and times to specific flights so that distresses can be responded to quickly.[14] The Coast Guard states that a similar procedure is used for commercial fishing industry fleet owners.[15] We agree with the Coast Guard and are adding clarifying language to the rules to address ATA's concerns by specifying that fleet owners must notify NOAA when ownership of the ELT is changed or when other registration information changes.

8. Several commenters support mandatory registration and suggest that it be required at the point-of-sale of the beacon.[16] NOAA, in late filed comments of December 20, 1993, contends that requiring registration before permitting the purchase of an EPIRB or ELT would eliminate the possibility of the beacon being used without a completed registration card.[17] However, there are some potential drawbacks to point-of-sale registration. For example, retailers sell EPIRBs and ELTs world-wide through mail order and do not have immediate access to the registration information. Additionally, buyers may purchase EPIRBs and ELTs for boats and aircraft they intend to acquire in the future. Further, commercial vessel fleet operators and aircarriers may purchase EPIRBs and ELTs in quantity for future use or for spares. Finally, we did not raise the issue of point-of-sale registration in the *Notice* and there is nothing in the record on how the Commission should require such registration. Therefore, we will not adopt this proposal. In addition, requiring registration at the time of purchase would misplace responsibility for registration on the vendors or retailers instead of on the owner of the beacon.

9. Mandatory registration will help government SAR operations to work better and cost less.[18] Therefore, we are adopting rules that require mandatory registration of beacons. We also are clarifying that registration must take place before installation of the beacon. Finally, we note that NOAA and the Coast Guard have been able to achieve a registration rate of approximately 75 per cent of all beacons sold[19] through education of beacon users. We expect this rate to improve with their continued education efforts and the adoption of mandatory registration.

IV. CONCLUSION

10. In summary, we have decided to amend the aviation service rules and the maritime service rules substantially as proposed to require registration of emergency position indicating radiobeacons (EPIRBs) and emergency locator transmitters (ELTs) operating on the frequency 406.025 MHz with NOAA. Amendment of the rules will enhance maritime and aviation safety by providing valuable distress information to SAR personnel concerning the type, size and itinerary of the aircraft/vessel as well as prevent launching potentially dangerous missions on false distress signals. Additionally, we are making minor, editorial amendments to Parts 80 and 87.

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[9] Typical mission costs of launching a single helicopter to locate and investigate a distress signal are approximately $4,000. *See* United States Coast Guard Petition for Rule Making (RM-8008) at 2.

[10] Currently the system has one experimental geostationary satellite located above the Americas at the equator, with Japan, India and Spain planning to place similar geostationary satellites with COSPAS/SARSAT capability into orbit. NASA comments at 4.

[11] Position information is determined by the Doppler shift of a distress signal. Geostationary satellites orbit synchronously with the earth's rotation and are, thus, apparently not moving relative to a beacon's position on the earth's surface. Doppler shift occurs when a polar orbiting satellite passes over a beacon.

[12] Because polar orbiting satellites orbit the earth in approximately 90 minutes and are not evenly spaced, they may not pass over an emergency beacon for up to an hour and a half. A geostationary satellite, however, is capable of detecting beacons anywhere within the satellite's footprint.

[13] ATA at 1.

[14] Coast Guard reply comments at 1.

[15] Coast Guard reply comments at 1.

[16] America House at 1, the BOC Challenge at 1, Cruising World at 1, Department of the Air Force at 2, National Oceanic and Atmospheric Administration at 3, Mary and Frank Plant at 1, Rodger Martin Yatch Designs at 1, RP Associates, Inc. at 1, NOAA late filed comments at 1, Durenburger at 1.

[17] NOAA late filed comments at 1.

[18] Vice President Al Gore, Report of the National Performance Review, From Red Tape to Results: Creating a Government That Works Better and Costs Less (1993). The Vice President's Report stresses serving customers and reducing costs as two of its key principles. This *Report and Order* embraces these principles by seeking ways to use new technologies more efficiently and to reduce the cost of the government's search and rescue costs.

[19] *See* Pacific Shield, July/August 1993, at 9.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Parts 80 and 87 of the Commission's Rules, 47 C.F.R. Parts 80 and 87, ARE AMENDED as set forth in the Appendix below, effective **September 13, 1994**.

12. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

13. For further information concerning this *Report and Order*, contact James Shaffer, Special Services Division, Private Radio Bureau, (202) 632-7197.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FINAL RULE

Parts 80 and 87 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.215 is amended by revising the second sentence in Note 3 to read as follows:

§ 80.215 Transmitter power.

* * * * *

(d) * * *

(1) * * *

Note 3 * * * For cable repair ships operating on radiodetermination frequencies, 15 watts; *see* § 80.375(b).

* * * * *

3. Section 80.1061 is amended by revising the last two sentences of paragraph (e) and revising paragraph (f) to read as follows:

§ 80.1061 Special requirements for 406.025 MHz EPIRBs.

* * * * *

(e) * * * With each marketable EPIRB unit the manufacturer or grantee must include a postage pre-paid registration card printed with the EPIRB identification code addressed to: NOAA/NESDIS, SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233. The registration card must request the owner's name, address, telephone number, type of ship, alternate emergency contact and include the following statement: "WARNING-failure to register this EPIRB with NOAA before installation could result in a monetary forfeiture being issued to the owner."

(f) To enhance protection of life and property it is mandatory that each 406.025 MHz EPIRB be registered with NOAA before installation and that information be kept up-to-date. Therefore, in addition to the identification plate or label requirements contained in §§ 2.925, 2.926 and 2.1003 of this Chapter, each 406.025 MHz EPIRB must be provided on the outside with a clearly discernable permanent plate or label containing the following statement: "The owner of this 406.025 MHz EPIRB must register the NOAA identification code contained on this label with the National Oceanic and Atmospheric Administration (NOAA) whose address is: NOAA, NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233." Vessel owners shall advise NOAA in writing upon change of vessel or EPIRB ownership, transfer of EPIRB to another vessel, or any other change in registration information. NOAA will provide registrants with proof of registration and change of registration postcards.

* * * * *

Part 87 - AVIATION SERVICES

4. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

5. Section 87.139 is amended by revising paragraph (d) to read as follows:

§ 87.139 Emission limitations.

* * * * *

(d) Except for telemetry in the 1435-1535 MHz band, when the frequency is removed from the assigned frequency by more than 250 percent of the authorized bandwidth for aircraft stations above 30 MHz and all ground stations the attenuation must be at least 43 + 10log10 pY dB.

* * * * *

6. In Section 87.199 paragraphs (e) and (f) are revised to read as follows:

§ 87.199 Special requirements for 406.025 MHz ELTs.

* * * * *

(e) An identification code, issued by the National Oceanic and Atmospheric Administration (NOAA), the United States Program Manager for the 406.025 MHz COSPAS/SARSAT satellite system, must be programmed in each ELT unit to establish a unique identification for each ELT station. With each marketable ELT unit the manufacturer or grantee must include a postage pre-paid registration card printed with the ELT identification code addressed to: NOAA/NESDIS, SARSAT Operations Division, E/SP3, Federal Building 4, Washington, DC 20233. The registration card must request the owner's name, address, telephone number, type of aircraft, alternate emergency contact and include the following statement: "WARNING-failure to register this ELT with NOAA before installation could result in a monetary forfeiture being issued to the owner."

(f) To enhance protection of life and property it is mandatory that each 406.025 MHz ELT be registered with NOAA before installation and that information be kept up-to-date. In addition to the identification plate or label requirements contained in §§ 2.925, 2.926 and 2.1003 of this Chapter, each 406.025 MHz ELT must be provided on the outside with a clearly discernable permanent plate or label containing the following statement: "The owner of this 406.025 MHz ELT must register the NOAA identification code contained on this label with the National Oceanic and Atmospheric Administration (NOAA) whose address is: NOAA, NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233." Aircraft owners shall advise NOAA in writing upon change of aircraft or ELT ownership, or any other change in registration information. Fleet operators must notify NOAA upon transfer of ELT to another aircraft outside of the owners control, or an other change in registration information. NOAA will provide registrants with proof of registration and change of registration postcards.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-68

In the Matter of

Amendment of Section 73.202(b), RM-8486
Table of Allotments,
FM Broadcast Stations.
(Billings, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1994; Released: July 6, 1994

Comment Date: August 27, 1994
Reply Comment Date: September 13, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Bruce L. Erickson ("petitioner"), requesting the allotment of Channel 286A to Billings, Montana, as that community's seventh FM broadcast service. Petitioner submitted information in support of the allotment at Billings, and stated his intention to file an application if a channel is allotted to the community.

2. We believe petitioner's proposal warrants consideration. Channel 286A can be allotted to Billings, Montana, in compliance with the minimum distance separation requirements of the Commission's rules without a site restriction.[1]

3. In view of the fact that the proposed allotment would provide additional broadcast service to Billings, Montana, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below:

	Channel No.	
Community	Present	Proposed
Billings, Montana	227C1, 231C, 246C2, 253C1, 275C1, 279C1	227C1, 231C, 246C2, 253C1, 275C1, 279C1, 286A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 27, 1994**, and reply comments on or before **September 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John R. Wilner
Bryan Cave
700 13th Street, N. W., Suite 600
Washington, D.C. 20005-3960

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 286A at Billings are 45-46-58 and 108-30-13.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-69

In the Matter of

Amendment of Section 73.202(b), RM-8490
Table of Allotments,
FM Broadcast Stations.
(Grenada, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1994; Released: July 6, 1994

Comment Date: August 27, 1994
Reply Comment Date: September 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Delta Radio, Inc. ("petitioner"), requesting the allotment of Channel 295A to Grenada, Mississippi, as the community's second local FM service. Petitioner states it will apply for Channel 295A, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 295A to Grenada since it could provide the community with its second local FM service. Channel 295A can be allotted to Grenada in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grenada, Mississippi	262C2	261C2, 295A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 27, 1994**, and reply comments on or before **September 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Larry G. Fuss, President
Delta Radio, Inc.
P.O. Box 1438
Cleveland, Mississippi 38732
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Com-

[1] The coordinates for Channel 295A at Grenada are North Latitude 33-46-36 and West Longitude 89-48-42.

mission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-303

In the Matter of

Amendment of Section 73.202(b),	RM-6707
Table of Allotments,	RM-6799
FM Broadcast Stations.	RM-7754
(Bay Minette, Butler,	RM-7813
Evergreen and Jackson, Alabama,	RM-7996
and Bay Springs, Ellisville &	RM-7997
Waynesboro, Mississippi)[1]	RM-7998
	RM-7999

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1994; Released: July 6, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 6012 (1991), issued in response to four separately filed conflicting petitions for rule making. The first petitioner, Butler Broadcasting Corporation ("Butler Broadcasting"), licensee of Station WQGL, Butler, Alabama, requested the substitution of Channel 228C2 for Channel 228A and modification of its license to specify operation on the higher class channel. Cotton Valley Broadcasting Co. ("Cotton Valley"), licensee of Station WIZK-FM, Bay Springs, Mississippi, proposed the substitution of Channel 232A for Channel 228A and modification of its license accordingly. Butler Broadcasting and Cotton Valley jointly filed the above petition (RM-6707). The second petitioner, G. Dean Pearce ("Pearce"), requested the allotment of Channel 232C2 to Ellisville, Mississippi, as that community's second local broadcast service (RM-6799). The third petitioner, Faulkner-Phillips Media, Inc. ("Faulkner-Phillips"), licensee of Station WMML-FM, Bay Minette, Alabama, requested the substitution of Channel 288C3 for Channel 288A, Bay Minette, and modification of its license accordingly (RM-7813). In order to accommodate this change, Faulkner-Phillips requested the substitution of Channel 299A for Channel 228A at Butler, Alabama, and modification of the license for Station WQGL and substitution of Channel 227A for Channel 288A at Waynesboro, Mississippi, and modification of the license for Station WABO.[2] The fourth petitioner, Wolff Broadcasting Corporation ("Wolff Broadcasting"), licensee of Station WPGG, Evergreen, Alabama, requested the substitution of Channel 227C1 for Channel 227C2 and modification of its license for Station WPGG to specify operation on the higher class channel (RM-7754).[3] Faulkner-Phillips, Cotton Valley, Wolff Broadcasting and Butler Broadcasting filed comments supporting their respective proposals. Pearce withdrew his proposal to add Channel 232C2 at Ellisville, Mississippi, on December 13, 1991. Since no comments were received in support of an additional channel at Ellisville, no further consideration will be given to the allotment of an FM channel in the community. Mississippi College ("MC") filed comments supporting Option I of the *Notice*. Martin Broadcasting Company ("Martin"), licensee of Station WABO-FM, Waynesboro, Mississippi, submitted comments in response to the *Order to Show Cause*. James Ducker ("Ducker") (RM-7998) counterproposed the allotment of Channel 232C3 at Sandersville, Mississippi, but withdrew his counterproposal on July 28, 1993.[4] Radio Station WHOD, Inc. ("WHOD, Inc.") filed a counterproposal for Jackson, Alabama (RM-7997).[5] Counterproposals were also filed by Thomas William Hickman, III ("Hickman"), licensee of Station WMFM(FM), Petal, Mississippi, and Newton Broadcasting Company, Inc. ("NBCI"), licensee of Station WMYQ(FM), Newton, Mississippi (RM-7999) and by G. Dean Pearce ("Pearce") (RM-7996).[6] Butler, Wolff Broadcasting,

[1] The community of Jackson, Alabama, has been added to the caption.

[2] The Butler Broadcasting/Cotton Valley and Faulkner-Phillips proposals may be examined pursuant to the rules governing minimum distance separation requirements in effect prior to October 2, 1989, since the petitions were filed before that date.

[3] On October 26, 1992, the Commission modified the call of sign of Station WIJK-FM, Evergreen, Alabama, to "WPGG."

[4] Ducker proposed the allotment of Channel 232C3 at Sandersville as a first local service in lieu of a second service at Ellisville and the substitution of Channel 232A for Channel 228A at Bay Springs. The counterproposal was put on public notice on May 22, 1992, but on July 28, 1993, Ducker withdrew his counterproposal for Sandersville, in compliance with Section 1.420(j) of the Commission's Rules. No supporting comments were received for the allotment of a channel at Sandersville.

[5] The counterproposal for Jackson, Alabama, was placed on public notice on May 22, 1992, Report No. 1892.

[6] The counterproposal filed jointly by Hickman, licensee of Station WMFM(FM), Petal, Mississippi, and NBCI, licensee of Station WMYQ(FM), Newton, Mississippi, gave two options. Option I proposes the substitution of Channel 269A, 269C3 or 269C2 for Channel 288A at Waynesboro, Mississippi, substitution of Channel 288C3 for Channel 288A at Bay Minette, Alabama, substitution of Channel 227C1 for Channel 227C2 at Evergreen, Alabama, allotment of Channel 232C3 at Sandersville, Mississippi, substitution of Channel 292C2 for Channel 292A at Petal, Mississippi, and substitution of Channel 288A or Channel 288C2 for Channel 292A at Newton, Mississippi. Option II included the same communities as listed in Option I with slightly different channel substitutions: the substitution of Channel 227A for Channel 288A at Waynesboro, Mississippi, no change at Evergreen, Alabama, and substitution of Channel 299A for Channel 228A at Butler, Alabama. It should be noted that Channel 292A was upgraded to Channel 292C2 at Petal, Mississippi, and Channel 250A was substituted for Channel 292A at Newton, Mississippi, in MM Docket 90-566. *See* 7 FCC Rcd 4998 (1992); *recon.* dismissed November 18, 1993. Pearce counterproposed the allotment of Channel 232C2 to Petal, Mississippi, as that community's second local FM channel. The above counterproposals were placed on Public Notice on May 22, 1992, Report No. 1892. Upon further analysis, we have determined that the counterproposals failed to include affidavits verifying that the statements contained in each were accurate to the best of the counterproponents' knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by

Hickman, MC and Martin filed reply comments. Capitol Broadcasting Corporation ("Capitol"), licensee of Station WKSJ-FM, Mobile, Alabama, WHOD, Inc., NBCI and Beach Broadcasting Limited Partnership ("Beach Broadcasting") filed comments in response to the four counterproposals. On April 13, 1994, Faulkner-Phillips withdrew its petition for rule making (RM-7813) in compliance with Section 1.420(j) of the Commission's Rules. Therefore, no further consideration will be given to Faulkner-Phillips' proposal or to responsive comments. Late-filed comments were received from Pearce and Wolff.[7]

2. In response to the petitions, the *Notice* solicited comments on the following options:

OPTION I

	Channel No.	
Community	Present	Proposed
Butler, Alabama	228A	228C2
Bay Springs, Mississippi	228A	232A
Evergreen, Alabama	227C2	227C1

OPTION II

Ellisville, Mississippi	272A	232C2, 272A
Bay Minette, Alabama	288A, 293A	288C3, 293A
Butler, Alabama	228A	299A
Waynesboro, Mississippi	288A	227A

OPTION III

Ellisville, Mississippi	272A	232C2, 272A
Evergreen, Alabama	227C2	227C1

3. WHOD, Inc. counterproposed the substitution of Channel 233C2 for Channel 233C3 at Jackson, Alabama, and modification of its construction permit for Station WHOD to specify operation on Channel 233C2. According to WHOD, Inc., the upgrade at Jackson should be favored over a second local service at Ellisville, as Channel 233C2 would provide a second full-time aural service to 4,099 persons in a 673.3 square mile area in rural southwestern Alabama. Also, the upgrade at Jackson is consistent with Option I of the *Notice* which would allow the Commission to approve station upgrades at Butler, Jackson and Evergreen instead of merely providing a second local service at Ellisville.

4. In comments, Butler Broadcasting continues to support the substitution of Channel 228C2 for Channel 228A at Butler, Alabama, and substitution of Channel 232A for Channel 228A at Bay Springs, Mississippi. Butler Broadcasting also supports the substitution of Channel 227C1 for Channel 227C2 at Evergreen, Alabama. According to Butler Broadcasting, adoption of Option I will result in significant new service to underserved areas. Butler Broadcasting states that Channel 228C2 at Butler will provide a second full-time aural service to 135 people in a 27 square kilometer area while none of the proposals in Options II and III provide any service under the Commission's top three allotment criteria. Furthermore, Channel 228C2 will provide new service to a significant underserved area (less than five existing services) of approximately 1,152 square kilometers with an estimated population of 8,480 people and the upgrade at Evergreen, which is part of Option I, would also result in service to an underserved area of 163 square kilometers with an estimated population of 4,054 people. Butler Broadcasting requests that the Commission adopt Option I as it best serves the public interest. Butler Broadcasting has an agreement with Cotton Valley to reimburse Cotton Valley for its expenses in connection with the frequency change at Bay Springs.

5. Cotton Valley, licensee of Station WIZK-FM, Bay Springs, Mississippi, supports Option I and modification of its license to specify operation on Channel 232A to accommodate the upgrade proposal at Butler. MC, licensee of Station WHJT, Clinton, Mississippi, also supports adoption of Option I. MC states that it currently operates at three kilowatts on Channel 228A and is foreclosed from seeking additional power due to the nearby location of Station WIZK-FM, Bay Springs, Mississippi, which is also licensed on Channel 228A. The substitution of Channel 232A for Channel 228A at Bay Springs by Cotton Valley would allow MC to seek additional power for Station WHJT. MC contends that grant of Option I will permit four southeastern communities to receive enhanced service.

6. Wolff Broadcasting, licensee of Station WPGG, Evergreen, Alabama, urges the Commission to substitute Channel 227C1 for Channel 227C2 at Evergreen. Wolff Broadcasting states that upgrading Station WPGG will increase its coverage by 8,988.3 square kilometers and serve an additional 129,207 people. Virtually all of this gain will be in rural areas of south Alabama and northwest Florida. In addition, Wolff Broadcasting points out that Station

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counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposals must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes ("Abuse of Process")*, 5 FCC Rcd 3911, 3919 n.41 (1990) ("Therefore, we believe these rules should be strictly enforced in allocations proceedings"). Counterproposals must be technically and procedurally correct at the time of their filing. *See Hattiesburg, Mississippi*, 7 FCC Rcd 7602 (1992). *See also Report and Order, Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). Therefore, we will dismiss the counterproposals filed by Hickman/NBCI and Pearce.

[7] Commission Rule 1.405(e) states that no additional pleadings may be filed unless specifically requested or authorized. We do not believe the public interest would be served by the acceptance of the additional comments filed by Pearce and Wolff.

WPGG is a primary affiliate of the Alabama EBS network and that a power increase would enable the Alabama EBS Network Plan to operate more efficiently.

7. In its reply comments, Wolff Broadcasting states that it has considered all comments filed and supports Option I of the *Notice*. Wolff further states that where the Commission places Channel 232 affects the rights of seven parties. According to Wolff, Option I provides for improved FM service at five communities. A Class C1 upgrade at Evergreen would provide a gain of at least 125,000 persons, a Class C2 upgrade at Butler would provide a gain of at least 82,000 persons, a Class C2 upgrade at Jackson would provide a gain of at least 17,900 persons, and the substitution of Channel 232A for Channel 228A at Bay springs permits Stations WIZK-FM and WHJT to operate at six kilowatts. Reply comments were filed by Cotton Valley and MC also supporting Option I, stating this allotment scheme will best serve the public interest by providing improved or additional service to the largest number of people. Butler filed reply comments supporting Option I of the *Notice*, stating that the upgrade at Butler would result in the provision of a second full-time aural service to 135 people in a 27 square kilometer area and will provide new service to a significant underserved area (less than five existing services) of approximately 1,152 square kilometers with an estimated population of 8,480 people.

8. Capitol operates Station WKSJ-FM, Channel 235C at Mobile, Alabama. Capitol states that it does not oppose the allotment of Channel 233C2 at Jackson provided WHOD, Inc. uses a site that fully complies with the geographic spacing requirements with respect to Station WKSJ-FM. Capitol further states that it takes no position on the comparative merits of the various proposals in this complicated proceeding.

9. Beach Broadcasting, permittee of Station WJZD, Channel 233A, Long Beach, Mississippi, filed an opposition to WHOD, Inc.'s counterproposal. According to Beach Broadcasting, Channel 233C2 at Jackson, Alabama, is short spaced to the transmitter site specified in Beach's application. Further, the Jackson allotment would preclude Beach Broadcasting from upgrading its facility on Channel 233. Beach Broadcasting indicates that an upgrade of its facility could increase its coverage to include an additional 60,000 people, which is a 35 percent increase over its current coverage. Beach Broadcasting argues that Station WHOD is already a Class C3 station providing wide area FM coverage. Beach Broadcasting requests that WHOD, Inc.'s proposal for Jackson, Alabama, be denied to enable Station WJZD, Long Beach, to upgrade to a higher class facility.

10. Conflicting proposals, such as have been filed in this proceeding, are comparatively considered under the guidelines set forth in *Revision of FM Assignment and Policies and Procedures*, 90 FCC 2d 88 (1982).[8] However, because of the withdrawal or dismissal of several petitions and counterproposals, such a comparison is no longer necessary in this proceeding. In response to the proposal filed jointly by Butler Broadcasting and Cotton Valley, we shall substitute Channel 228C2 for Channel 228A at Butler, Alabama, and modify the license for Station WQGL accordingly, in compliance with the Commission's spacing requirements.[9] To accommodate Channel 228C2 at Butler, we shall substitute Channel 232A for Channel 228A at Bay Springs, Mississippi. Channel 232A can be allotted to Bay Springs, Mississippi, at the current site for Station WIZK-FM.[10] As requested by Wolff Broadcasting, licensee of Station WPGG, Evergreen, Alabama, we shall substitute Channel 227C1 for Channel 227C2 at Evergreen and modify its license for Station WPGG accordingly.[11] Finally, in response to the counterproposal filed by WHOD, Inc., we shall substitute Channel 233C2 for Channel 233C3 at Jackson, Alabama, and modify the license for Station WHOD, Channel 233C3, to specify operation on Channel 233C2. Channel 233C2 can be allotted to Jackson in compliance with the Commission's spacing requirements at WHOD, Inc.'s specified site.[12] The allotment of Channel 233C2 is short spaced to a construction permit for Station WJZD, Channel 233A, Long Beach, Mississippi. However, the Long Beach permit was granted in accordance with the provisions of Section 73.215 of the Commission's Rules, which allows contour protection for short spaced assignments. At the site selected by WHOD, Inc., Channel 233C2 is also fully spaced to Channel 235C, Station WKSJ-FM, Mobile, Alabama and to the allotment of Channel 233A, Long Beach, Mississippi. Although we recognize Beach Broadcasting's concerns with the allotment of Channel 233C2 at Jackson preventing future upgrades at Long Beach, it is not Commission policy to allot alternate channels or deny allotments only to protect a possible future request for rule making. *See Clarendon, Pennsylvania*, 6 FCC Rcd 6053 (1991) and *Hardinsburg, Kentucky*, 5 FCC Rcd 7685 (1990).

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 19, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Bay Springs, Mississippi	232A
Butler, Alabama	228C2
Evergreen, Alabama	227C1
Jackson, Alabama	233C2

12. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WQGL, Butler, Alabama, IS MODIFIED to specify operation on Channel 228C2; the license of Station WIJK-FM, Evergreen, Alabama, IS MODIFIED to specify operation

[8] The priorities are (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)].

[9] The coordinates for Channel 228C2 at Butler are 32-08-10 and 88-15-00.

[10] The coordinates for Channel 232A at Bay Springs are 31-59-00 and 89-13-50.

[11] The coordinates for Channel 227C1 at Evergreen are 31-14-48 and 86-48-32.

[12] The coordinates for Channel 233C2 at Jackson are 31-30-35 and 88-02-39.

on Channel 227C1; and, the license of Station WHOD, Jackson, Alabama, IS MODIFIED to specify operation on Channel 233C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall file with the Commission minor change applications for construction permits (Form 301), specifying the new facilities.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WIZK-FM, Bay Springs, Mississippi, Channel 228A, IS MODIFIED, to specify operation on Channel 232A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-6730, except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-6730, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That the petition filed by Faulkner-Philips, Inc. (RM-7813) IS DISMISSED.

15. IT IS FURTHER ORDERED, That the petition filed by G. Dean Pearce (RM-6799) IS DISMISSED.

16. IT IS FURTHER ORDERED, That the counterproposal filed jointly by Thomas William Hickman, III and Newton Broadcasting Company (RM-7999) IS DISMISSED.

17. IT IS FURTHER ORDERED, That the counterproposal filed by G. Dean Pearce (RM-7996) IS DISMISSED.

18. IT IS FURTHER ORDERED, That the counterproposal filed by James Ducker (RM-7998) IS DISMISSED.

19. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wolff Broadcasting Corporation, licensee of Station WIJK-FM, Evergreen, Alabama, and Radio Station WHOD, Inc., licensee of Station WHOD, Jackson, Alabama, are required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.[13]

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[13] The rule making fee requirement applies only to those petitions filed after May 21, 1990, the effective date of the fee collection program implementing the provisions of the *Omnibus Budget Reconciliation Act of 1989* (Gen. Doc. 86-285), 5 FCC Rcd 3558, 3575 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-73

In the Matter of

Amendment of Section 73.202(b), RM-8489
Table of Allotments,
FM Broadcast Stations.
(Clarksdale, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1994; Released: July 6, 1994

Comment Date: August 27, 1994
Reply Comment Date: September 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Leroy P. Jenkins, Jr., d/b/a Delta Blues Broadcasting ("petitioner"), requesting the allotment of Channel 221A to Clarksdale, Mississippi, as the community's fourth local FM service. Petitioner states it will apply for Channel 221A at Clarksdale.

2. We believe the public interest would be served by proposing the allotment of Channel 221A to Clarksdale since it could provide the community with an additional local FM service. Channel 221 can be allotted to Clarksdale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3 miles) west to avoid a short-spacing conflict with a construction permit (BPH-930301IC) for Station WUMS-FM, Channel 221A, University, Mississippi.[1] In addition, this proposal is contingent upon Station WUMS-FM at University receiving a license to operate on Channel 221A.[2] Therefore, we may not finalize this proceeding until the University station is licensed at the proposed site.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarksdale, Mississippi	243C3, 268C3, 293C2	221A, 243C3, 268C3, 293C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, Student Media Center of the University of Mississippi, Room 231, Farley Hall, University, Mississippi, 38677 (Licensee of Station WUMS-FM).

6. Interested parties may file comments on or before **August 27, 1994**, and reply comments on or before **September 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leroy P. Jenkins, Jr., d/b/a
Delta Blues Broadcasting
P.O. Box 139
Gunnison, Mississippi 38746
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel 221A at Clarksdale are North Latitude 34-11-42 and West Longitude 90-37-38.
[2] The coordinates for the construction permit site of WUMS-FM, Channel 221A at University, Mississippi are North Latitude 34-24-12 and West Longitude 89-24-13.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

LETTER
May 5, 1994

Released: July 6, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Chestnut Broadcasting Co., Licensee	8310-SP
Radio Station KBER(FM)	93050034
101 W. Grand	93080148
Chicago, IL 60610	

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. Our action is based on the facts set forth below.

The Commission received a complaint from Mr. Roger Stone alleging that on March 24, 1993, the KBER(FM) "morning team" placed a telephone call to him at Radio Station KRSP(FM) and, without informing him that the conversation was intended for broadcast use, recorded the conversation and subsequently broadcast portions of it. Based on this complaint the Commission sent KBER(FM) a letter of inquiry on May 21, 1993. Your attorney responded to the letter of inquiry by letter dated August 4, 1993, admitting that said telephone call was broadcast in violation of Section 73.1206 of the Commission's Rules.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Chestnut Broadcasting Company, licensee of Station KBER(FM), Ogden, UT, is hereby advised of its apparent liability for a forfeiture in the amount of $5,000.00 for said incident, which constitutes a willful violation of Section 73.1206. The amount of the forfeiture was determined by using the criteria set forth in the *Policy Statement on Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you are afforded a period of thirty days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SBC Media Venture, Inc.

Motion for Extension of Time

ORDER

Adopted: June 16, 1994; Released: June 17, 1994

By the Chief, Cable Services Bureau:

1. On June 15, 1994 a Motion for Extension of Time was filed by Montgomery County, Maryland ("the County") in the above referenced matter. In it, the County requested that the time to file its answer to the May 31, 1994 Petition for Partial Review, filed with the Commission by William J. Franklin, Esq., a participant in the County's ratemaking proceeding, be extended until Monday, June 20, 1994.

2. In its Motion, counsel for the County stated that the Commission staff had been notified of the filing of the Motion, that Mr. Franklin had consented to the Motion, and that counsel for SBC Media Ventures, Inc. did not object to the Motion.[1]

3. It is the policy of the Commission that extensions of time shall not be routinely granted.[2] The parties, however, have all been contacted and none have objected to this particular Motion. Although the Commission does not object to the granting of this particular Motion, the parties are reminded that they are expected to comply with deadlines set out in the Commission's Rules and should not rely on the grant of such Motions in the future.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by Montgomery County, Maryland is GRANTED IN FULL.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] The County has acted in compliance with our rules in contacting the staff and the other affected parties. When a motion for extension of time is filed less than 7 days prior to the day for filing the papers, the Commission's Rules require the party filing the motion to orally notify the other parties and the Commission staff personnel responsible for acting on the motion that the motion has been filed. 47 C.F.R. §1.46(c).

[2] 47 C.F.R. §1.46(a)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HIGHLAND INDEPENDENT SCHOOL DISTRICT
Roscoe, TX — File No. BPLIF-920203DA

ROBY CONSOLIDATED INDEPENDENT SCHOOL DISTRICT
Snyder, TX — File No. BPLIF-920821DD

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels A1-A4

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1994; Released: July 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Highland Independent School District (Highland) and Roby Consolidated Independent School District (Roby) for a construction permit and license on Channels A1-A4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve Roscoe, Texas and Snyder, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Both Highland and Roby are accredited by the Texas Education Agency and are applying to provide ITFS service to their own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order),* 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both Highland and Roby are entitled to four points because they are school districts that propose to offer programming to serve students at schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points because they are accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Highland's illustrative schedule and its program grid both propose an average of 24.375 hours of formal ITFS programming per

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order,* 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

channel per week. Thus, Highland is entitled to one programming merit point. Roby's illustrative schedule and its program grid were both amended by the "B" cut-off date, which was November 9, 1993, to propose an average of 41 hours of formal ITFS programming per channel per week. Thus, Roby is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Highland is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Roby is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, the tentative selectee is Roby.[3]

OTHER MATTERS

5. Roby proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Snyder Microwave Communications, L.C., two of whose provisions do not comply with the Commission's requirements for such leases. First, the lease appears to give Snyder unilateral authority to change the transmission site. We view this as inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. *Second Report and Order*, 101 FCC 2d at 90. Further, the lease does not include a provision which would afford the licensee an opportunity to purchase or lease the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1987). Accordingly, Roby's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, no petitions to deny or informal objections have been filed against Roby's application.

6. We find Roby fully qualified to be an ITFS licensee and conclude that grant of Roby's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Highland Independent School District (BPLIF-920203DA) IS DENIED, the petition to deny the Highland application IS DISMISSED as moot, and the application of Roby Consolidated Independent School District (BPLIF-920821DD) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Roby submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Snyder Microwave Communications, L.C. filed a petition to deny the application of Highland. Because we have tentatively selected Roby as the winning applicant, we find it unnecessary to consider Snyder's petition against Highland. Accordingly, we will dismiss this petition as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PLATTE VALLEY SCHOOL DISTRICT RE-7
Ault, CO — File No. BPLIF-911219DF

FRONT RANGE COMMUNITY COLLEGE
Greeley, CO — File No. BPLIF-920422DA

WELD COUNTY SCHOOL DISTRICT RE-5J
Greeley, CO — File No. BPLIF-920424DG

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1-A4.

WELD COUNTY SCHOOL DISTRICT RE-10J
Ault, CO — File No. BPLIF-911219DE

WELD COUNTY SCHOOL DISTRICT RE-4
Greeley, CO — File No. BPLIF-920424DQ

POUDRE SCHOOL DISTRICT R-1
Greeley, CO — File No. BPLIF-920422DG

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1-B4.

EATON RE-2 SCHOOL DISTRICT
Ault, CO — File No. BPLIF-911219DD

BOARD OF TRUSTEES FOR THE UNIVERSITY OF NORTHERN COLORADO
Greeley, CO — File No. BPLIF-920424DI

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1-C4.

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; Released: July 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Platte Valley School District RE-7 (Platte Valley), Front Range Community College (Front Range), and Weld County School District RE-5J (Weld RE-5J) each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Ault and Greeley, Colorado. Also, before the Commission are the mutually exclusive applications of Weld County School District RE-10J (Weld RE-10J), Poudre School District R-1 (Poudre), and Weld County School District RE-4 (Weld RE-4) for a construction permit and license on ITFS Channels B1-B4 and the mutually exclusive applications of Eaton RE-2 School District (Eaton) and the Board of Trustees for the University of Northern Colorado (Northern Colorado) for a construction permit and license on ITFS Channels C1-C4. These applicants also propose to serve the Ault and Greeley, Colorado areas. Because of potential adjacent channel interference and the proximity of the communities involved, the eight applications must be considered as one mutually exclusive group.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All of the applicants are qualified to be ITFS licensees. Platte Valley, Weld RE-5J, Weld RE-10J, Weld RE-4, Poudre, and Eaton are school districts that are accredited by the Colorado State Board of Education and that propose to provide ITFS service to schools within their jurisdictions and to others located in neighboring school districts. Front Range and Northern Colorado are accredited by the North Central Association for Colleges and Schools and each proposes to serve its own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television*

Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order), 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Front Range and Northern Colorado are educational institutions engaged in the formal education of their own enrolled students. Each of the remaining applicants is a school district proposing to provide ITFS service to schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Each school district is accredited by the Colorado State Board of Education. Front Range and Northern Colorado are accredited by the North Central Association for Colleges and Schools.

Four-Channel Limitation. No applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

The illustrative schedules submitted by Platte Valley, Weld RE-10J, and Eaton each propose an average of 25 hours of ITFS programming per channel per week. However, their schedules do not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, the programming grids of Platte Valley, Weld RE-10J, and Eaton propose an average of 4 hours of formal educational programming per channel per week.[3] Because neither the amount of programming specified in the applicants' schedules or in their grids reaches the threshold amount at which merit points are awarded, Platte Valley, Weld RE-10J, and Eaton are not entitled to any programming merit points.

There are inconsistencies between the amounts of formal ITFS programming specified in the illustrative schedules and in the program grids of Poudre, Front Range, and Weld RE-4. Using the lesser amounts specified, Poudre is deemed to have proposed an average of 43 hours of formal educational programming; Front Range an average of 42 hours; and Weld RE-4 an average of 39.75 hours. Both Poudre and Front Range are, therefore, entitled to two programming merit points. Weld RE-4 is entitled to one programming merit point.

Weld RE-5J's illustrative schedule and program grid propose an average of 40 hours of formal ITFS programming per channel per week. Accordingly, Weld RE-5J is entitled to one programming merit point. Likewise, Northern Colorado, whose illustrative schedule and program grid indicate an average of 40 hours of formal ITFS programming per channel per week, is entitled to one programming merit point.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total. Each applicant is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because Platte Valley, Weld RE-10J, and Eaton are not entitled to any programming merit points, each of these applicants has a total of only nine points. Weld RE-4, Weld RE-5J and Northern Colorado are entitled to one programming merit point for proposing at least 21 hours of formal ITFS programming per channel per week, for a total of ten points each. In contrast, Poudre and Front Range are entitled to two programming merit points for proposing at least 41 hours of formal ITFS programming per channel per week, for a total of eleven points each. While Poudre and Front Range have the same merit point totals, their applications are not mutually exclusive with each other. Accordingly, each is a tentative selectee.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

[3] Platte Valley and Weld RE-10J amended their applications, after the "B" cut-off date of July 22, 1992, to make "clerical" corrections of the information submitted in their program grids. The amendment submitted by Weld RE-10J would not change the applicant's comparative position. In contrast, if considered, Platte Valley's amendment would upgrade its comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date and, therefore, the Platte Valley amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

OTHER MATTERS

5. Poudre and Front Range propose to lease their excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Each applicant has submitted a copy of its lease with Choice TV of Colorado, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against either Poudre's application or that of Front Range.

6. We find Poudre and Front Range fully qualified to be ITFS licensees and conclude that grant of their applications would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the applications of Platte Valley School District RE-7 (BPLIF-911219DF), Weld County School District RE-5J (BPLIF-920424DG), Weld County School District RE-10J (BPLIF-911219DE), Weld County School District RE-4 (BPLIF-920424DQ), Eaton RE-2 School District (BPLIF-911219DD), and Board of Trustees for the University of Northern Colorado (BPLIF-920424DI) ARE DENIED, and the applications of Front Range Community College (BPLIF-920422DA) and Poudre School District R-1 (BPLIF-920422DG) ARE GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DAKOTA SCHOOL DISTRICT #3
Amenia, ND — File No. BPLIF-920709DE

RICHLAND PUBLIC SCHOOLS
Walcott, ND — File No. BPLIF-921016DK

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels A1-A4

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; **Released: July 6, 1994**

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Dakota School District #3 ("District") and Richland Public Schools ("Richland") for a construction permit and license on Channels A1-A4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve the areas of Amenia and Walcott, North Dakota, respectively. The District has filed a petition to deny the application of Richland.[1]

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. The District is accredited by the State of North Dakota and is applying to provide ITFS service to its own students. Richland is accredited by the State of North Dakota Department of Public Instruction and is also proposing to provide ITFS service to its own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 74 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[3] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. The District is entitled to four points because it proposes to offer programming to its own students. Richland is entitled to four points because it also proposes to offer programming to its own students.

Accreditation. The District is entitled to three points because it is accredited by the state of North Dakota and it intends to serve its own students. Richland is entitled to three points because it is accredited by the Department of Public Instruction and it intends to serve its own students.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the

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[1] The petition to deny filed by the District will be dismissed as moot because of our actions below.

[2] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

The District's illustrative schedule and programming grid both propose an average of 22 hours of formal ITFS programming per channel per week. Thus, the District is entitled to one programming merit point. In contrast, Richland's illustrative schedule and programming grid both propose an average of 24.375 hours of ITFS programming. The programming grid indicates that the programming will be formal, while the schedule does not so indicate. Consequently, Richland's programming will be considered as non-formal and it is therefore not entitled to any programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. The District is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel, per week, for a total of ten points. Richland is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is the District.

OTHER MATTERS

5. The District proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Cass County Electric Coop., Inc., which conforms in all respects with our requirements.

6. We find the District fully qualified to be an ITFS licensee and conclude that grant of the District's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by Dakota School District #3 IS DISMISSED as moot, the application of Richland Public Schools (BPLIF-921016DK) IS DENIED, and the application of Dakota School District #3 (BPLIF-920709DE) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WAY OF THE CROSS
OF HUTCHINSON, INC.
Hutchinson, KS

For Application to Replace Expired Permit
of KTFJ(TV), Channel 36, Hutchinson, KS

ORDER

Adopted: June 10, 1994; Released: July 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. On April 17, 1986, the Chief, Television Branch, acting pursuant to delegated authority, cancelled the construction permit of Way of the Cross of Hutchinson, Inc. (Way of the Cross) for Station KTFJ(TV), Channel 36, Hutchinson, Kansas, after the permittee allowed the permit to expire and did not file a timely application to replace the permit. No petition for reconsideration of that action was filed. That action became final on May 18, 1986. More than five years later on October 24, 1991, Way of the Cross filed an application to replace the expired permit. The Chief, Television Branch, dismissed that application on December 10, 1991. A petition for reconsideration of that action was subsequently denied by the Assistant Chief, Video Services Division, on June 29, 1992. The Commission now has before it for consideration Way of the Cross' application for review of those actions.

2. In its application for review, Way of the Cross merely reiterates arguments previously made and rejected in the staff rulings. We have reviewed the actions of the staff and we conclude that the matter was fairly considered and properly decided. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, Way of the Cross' application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6898
Tariff F.C.C. No. 12
Option 7

ORDER

Adopted: June 9, 1994; Released: June 9, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 29, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing increases rates and charges applicable to customers ordering service after May 19, 1994. The transmittal is currently scheduled to take effect on June 10, 1994.

2. On May 5, 1994, General Electric Company (GE) and Public Service Enterprises of Pennsylvania, Inc., (PSE) filed petitions to reject or suspend and investigate Transmittal No. 6898. AT&T filed a reply on May 9.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6898, the GE and PSE petitions, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 7, Transmittal No. 6898, filed by General Electric Company and Public Service Enterprises of Pennsylvania ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies

Pacific Bell and Nevada Bell

Petitions for Extension of Waivers
of Transport Rate Structure
and Pricing Requirements

ORDER

Adopted: June 27, 1994; Released: June 28, 1994

By the Deputy Chief (Policy), Common Carrier Bureau:

1. In the *Transport Order*, the Commission adopted rules governing rate structure for transport services.[1] The Order adopted the term "direct-trunked transport" to describe transport service from the serving wire center (SWC) to the end office on dedicated facilities, without switching at the tandem. The local exchange carriers (LECs) would impose a flat monthly charge for direct-trunked transport. Direct-trunked transport was distinguished from "tandem-switched transport," which describes transport from the SWC to the end office that includes switching at the tandem and is billed on a per-minute basis.[2] Later, in the *First Transport Reconsideration Order*, the Commission amended those rules to require local exchange carriers (LECs) to allow customers to purchase direct-trunked transport from a SWC to a host office, and to pay a per-minute rate for their traffic carried between host offices and remote offices.[3] On December 17, 1993, the Common Carrier Bureau (Bureau) granted waivers to several LECs, including the Ameritech Operating Companies (Ameritech) and Pacific Bell and Nevada Bell (together, Pacific), to delay these transport billing requirements. In Ameritech's and Pacific's cases, these billing requirements were delayed to July 1, 1994.[4]

2. Pacific and Ameritech have now filed petitions to further extend the transport waivers granted in December 1993. Pacific seeks an extension until November 1, 1994, and Ameritech seeks an extension until February 1, 1995. Ameritech and Pacific claim that the modifications to their Customer Access Billing System (CABS) necessary to permit billing for host-remote configurations are too time-consuming to be completed before July 1, 1994.[5] No oppositions or replies were filed.[6]

3. Rules may be waived if there is "good cause" to do so.[7] The Commission may exercise its discretion to waive a rule whenever particular facts would make strict compliance inconsistent with the public interest.[8] Pacific and Ameritech have shown that the necessary reprogramming of their CABS billing systems is a difficult and labor-intensive process, and their estimates for the time required to complete revising their billing systems appear to be reasonable. Furthermore, no party has opposed Pacific's or Ameritech's waiver requests. Therefore, we conclude that Pacific and Ameritech have shown good cause for extension of the limited waiver of the host-remote transport billing requirements.

4. Accordingly, IT IS ORDERED that the petition for waiver filed by Ameritech Operating Companies IS GRANTED.

5. IT IS FURTHER ORDERED that the petition for waiver filed by Pacific Bell and Nevada Bell IS GRANTED.

6. We hereby grant Ameritech, Pacific Bell, and Nevada Bell a waiver, on our own motion, of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, to make tariff revisions on one day's notice consistent with this Order. Ameritech, Pacific Bell, and Nevada Bell shall cite the DA number of this Order as authority for these filings.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[1] Transport Rate Structure and Pricing, 7 FCC Rcd 7006 (1992) (*Transport Order); on reconsideration*, 8 FCC Rcd 5370 (1993) (*First Transport Reconsideration Order); on further reconsideration*, 8 FCC Rcd 6233 (1993) (*Second Transport Reconsideration Order), further reconsideration pending.*

[2] *See* Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111, 69.112; *Transport Order*, 7 FCC Rcd at 7009 n.7, and 7077, Diagram 3.

[3] *First Transport Reconsideration Order*, 8 FCC Rcd at 5372 (para. 13).

[4] Petitions for Waiver of Transport Rate Structure and Pricing Requirements, 9 FCC Rcd 796, 806-07 (Com. Car. Bur. 1993) (*Transport Waiver Order*).

[5] Ameritech Petition at 1-2; Pacific Petition at 2-3.

[6] Oppositions were due on June 13, 1994, and replies were due on June 20, 1994. *See* Ameritech, Pacific Bell and Nevada Bell File Petition for Waiver of the Commission's Transport Rules (CC Docket No. 91-213), Public Notice, DA 94-579 (released June 2, 1994).

[7] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[8] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SUNRISE ACADEMY File No. BPLIF-920319DF
Naples, FL

COMMUNITY SCHOOL OF NAPLES File No. BPLIF-930219EZ
Marco Island, FL

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1, B2, B3, and B4.

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; Released: July 7, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Sunrise Academy (Sunrise) and Community School of Naples (Community), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Naples and Marco Island, Florida, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are engaged in the formal education of their own enrolled students and are accredited by the Florida Council of Independent Schools.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Each proposes to serve the formal educational needs of its own students.

Accreditation. Each applicant is entitled to three points because it is accredited by the Florida Council of Independent Schools.

Four-Channel Limitation. Each applicant is entitled to two points for remaining within the four-channel limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Sunrise's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational ITFS programming per channel per week. Thus, Sunrise is entitled to one programming merit point. Community's illustrative schedule proposes averages of 30 hours of formal educational ITFS programming per channel per week and 10 hours of other ITFS programming per channel per week, while its programming grid proposes an average of 20 hours of formal educational ITFS programming per channel per week. Thus, Community is deemed to have proposed an average of 20 hours of formal educational programming per week and is not entitled to any programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Sunrise is entitled to four points for being local, three points for being accredited, two points for observing the four- channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. Community is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, Sunrise is the tentative selectee.

OTHER MATTERS

5. Sunrise proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Sunrise has submitted a copy of its lease with RuralVision South, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Sunrise's application.

6. We find Sunrise fully qualified to be an ITFS licensee and conclude that grant of Sunrise's application would serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the application of Community School of Naples (BPLIF-930219EZ) IS DENIED, and the application of Sunrise Academy (BPLIF-920319DF) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BLINN COLLEGE File No. BPLIF-911219DH
Bryan, TX

BUFFALO INDEPENDENT SCHOOL DISTRICT File No. BPLIF-911230DI
Bremond, TX

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1, D2,
D3, and D4.

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; Released: July 7, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Blinn College (Blinn) and Buffalo Independent School District (Buffalo), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Bryan and Bremond, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Blinn, a college proposing to serve the formal educational needs of its enrolled students, is accredited by the Southern Association of Colleges and Schools. Buffalo is a school district that is accredited by the Texas Education Agency and that is applying to provide ITFS service to students at schools located within and outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Blinn's proposed facilities will be located in and serve the area in which it is located. Buffalo is serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Blinn is accredited by the Southern Association of Colleges and Schools, whereas Buffalo is accredited by the Texas Education Agency.

Four-Channel Limitation. Each applicant is entitled to two points for remaining within the four-channel limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the sched-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

ule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecom-munications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Blinn's illustrative schedule proposes an average of 6.25 hours of formal ITFS programming and 19.75 hours of other ITFS programming per channel per week, while its programming grid proposes averages of 7.5 hours of formal ITFS programming and 18.5 hours of other ITFS programming per channel per week. Because neither the amount of programming specified in Blinn's schedule or in its grid reaches the threshold amount at which merit points are awarded, Blinn is entitled to no programming merit points.

Buffalo's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, Buffalo's programming grid proposes an average of 4 hours of formal educational programming per channel per week.[3] Because neither amount of programming proposed reaches the threshold amount at which merit points are awarded, Buffalo is also entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Blinn and Buffalo are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, for a total of nine points each. Because Blinn and Buffalo are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990), and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[4] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Blinn submitted enrollment figures only for students attending its college. Buffalo submitted enrollment figures for receive sites in its jurisdiction, as well as for receive sites outside its jurisdiction. However, we cannot count the students from those sites outside its jurisdiction because letters of intended use were not submitted prior to the "B" cut-off date of November 3, 1992. As a result, we will count enrolled students only at schools within Buffalo's jurisdiction. Accordingly, we credit Blinn with 5,511 students and Buffalo with 811 students. Because the number of students credited to Buffalo is less than 80 percent of the total number of students credited to Blinn, Buffalo's application will be denied and Blinn will be authorized to operate facilities on Channels D1-D4.

OTHER MATTERS

7. Blinn proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Blinn has submitted a copy of its lease with Sun World Communications, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Blinn's application.

8. We find Blinn fully qualified to be an ITFS licensee and conclude that grant of Blinn's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Buffalo Independent School District (BPLIF-911230DI) IS DENIED, and the application of Blinn College (BPLIF-911219DH) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

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[3] Buffalo amended its application, after the "B" cut-off date of November 3, 1992, to "clarify" the information submitted in its program grid. If considered, the amendment would upgrade Buffalo's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off-date and, therefore, this "clarifying" amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

[4] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TEXAS A&M UNIVERSITY
Bryan, TX — File No. BPLIF-911219DI

CALVERT INDEPENDENT SCHOOL DISTRICT
Bremond, TX — File No. BPLIF-911230DL

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels C1, C2,
C3, and C4.

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; Released: July 7, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Texas A&M University (University) and Calvert Independent School District (Calvert), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Bryan and Bremond, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. University is engaged in the formal education of its own enrolled students and is accredited by the Southern Association of Colleges and Schools. Calvert is a school district that is accredited by the Texas Education Agency and that is applying to provide ITFS service to students at schools within and outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. University's proposed facilities will be located in and serve the area in which it is located. Calvert is serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. University is accredited by the Southern Association of Colleges and Schools, whereas Calvert is accredited by the Texas Education Agency.

Four-Channel Limitation. Each applicant is entitled to two points for remaining within the four-channel limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." University's illustrative schedule and programming grid propose

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

an average of 24.25 hours of formal ITFS programming per channel per week. Calvert's illustrative schedule and programming grid propose an average of 24.375 hours of formal ITFS programming per channel per week. Thus, each applicant is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. University and Calvert are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal ITFS programming per channel per week, for a total of ten points each. Because University and Calvert are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990), and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. University submitted enrollment figures only for students attending its school. Calvert submitted enrollment figures for receive sites in its jurisdiction, as well as for receive sites outside its jurisdiction. However, we cannot count the students from those sites outside its jurisdiction because letters of intended use were not submitted prior to the "B" cut-off date of October 3, 1993. As a result, we will count enrolled students only at schools within Calvert's jurisdiction. Accordingly, we credit University with 41,710 students and Calvert with 307 students. Because the number of students credited to Calvert is less than 80 percent of the total number of students credited to University, Calvert's application will be denied and University will be authorized to operate facilities on Channels C1-C4.

OTHER MATTERS

7. University proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. University has submitted a copy of its lease with Sun World Communications, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against University's application.

8. We find University fully qualified to be an ITFS licensee and conclude that grant of University's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Calvert Independent School District (BPLIF-911230DL) IS DENIED, and the application of Texas A&M University (BPLIF-911219DI) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date, may be used in determining the number of students served. *Third Report and Order Recon., supra.* Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT
Bryan, TX — File No. BPLIF-911219DJ

HEARNE INDEPENDENT SCHOOL DISTRICT
Bremond, TX — File No. BPLIF-911230DQ

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels B1, B2,
B3, and B4.

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1994; Released: July 7, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of College Station Independent School District (College) and Hearne Independent School District (Hearne), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Bryan and Bremond, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. College and Hearne are school districts accredited by the Texas Education Agency. Both applicants propose to serve the formal educational needs of students enrolled at schools located within and outside their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Each is a school district serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Each is accredited by the Texas Education Agency.

Four-Channel Limitation. Each applicant is entitled to two points for remaining within the four-channel limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecom-munications Network, Inc.*, 7 FCC Rcd 5924 (1992).

College's illustrative schedule proposes an average of 11.5 hours of formal ITFS programming and 21 hours of other ITFS programming per channel per week, while its programming grid proposes averages of 11.5 hours of formal ITFS programming and 22 hours of other ITFS programming per channel per week. Because neither the amount of programming specified in College's schedule or in its grid reaches the threshold amount at which merit points are awarded, College is entitled to no programming merit points.

In its illustrative schedule, Hearne proposes an average of 24.375 hours of ITFS programming per channel per week. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, Hearne's programming grid proposes an average of 4 hours of formal educational programming per channel per week.[3] Because neither amount of programming proposed reaches the threshold amount at which merit points are awarded, Hearne is also entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. College and Hearne are entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points each. Because College and Hearne are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[4] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. College submitted enrollment figures only for students at receive sites located within its jurisdiction. Hearne submitted enrollment figures for receive sites within its jurisdiction, as well as for receive sites outside its jurisdiction. However, we cannot count the students from those sites outside Hearne's jurisdiction because letters of intended use were not submitted prior to the "B" cut-off date of November 3, 1992. As a result, we will count enrolled students only at schools within Hearne's jurisdiction. Accordingly, we credit College with 5,974 students and Hearne with 1,507 students. Because the number of students credited to Hearne is less than 80 percent of the total number of students credited to College, Hearne's application will be denied and College will be authorized to operate facilities on Channels B1-B4.

OTHER MATTERS

7. College proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. College has submitted a copy of its lease with Sun World Communications, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against College's application.

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[3] Hearne amended its application, after the "B" cut-off date of November 3, 1992, to "clarify" the information submitted in its program grid. If considered, the amendment would upgrade Hearne's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date. Therefore, this "clarifying" amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

[4] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

8. We find College fully qualified to be an ITFS licensee and conclude that grant of College's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Hearne Independent School District (BPLIF-911230DQ) IS DENIED, and the application of College Independent School District (BPLIF-911219DJ) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SACRAMENTO RSA LIMITED PARTNERSHIP — File No. 10420-CL-P-672-A-89

For facilities in the
Domestic Public Cellular
Telecommunications Radio Service
on Frequency Block A, in
Market 672, Texas 21 -
Chambers Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: July 7, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it a Petition for Reconsideration of the Commission's decision in *Continental Cellular*, 6 FCC Rcd 6835 (1991), *Erratum*, 6 FCC Rcd 7205 (1991), *aff'd sub nom., Moving Phones Partnership L.P. v. FCC*, Case No. 91-1611, slip op. (D.C. Cir. July 30, 1993), filed by Sacramento RSA Limited Partnership (Sacramento).[1] Sacramento seeks reconsideration of our decision in *Continental Cellular* that its application violates the alien ownership restrictions in Section 310(b)(3)[2] of the Communications Act of 1934, as amended, and Section 22.4[3] of our Rules. Thomas Domencich and the Committee for a Fair Lottery have opposed Sacramento's petition. Sacramento alleges that we did not fully consider its arguments that its alien limited partner was insulated from management and control of the partnership. As we show below, we did fully consider Sacramento's arguments and correctly decided that Sacramento's application violated the alien ownership restrictions. Accordingly, we affirm our decision and deny reconsideration.

I. BACKGROUND

2. Sacramento was selected first in the lottery for the Texas 21 (Chambers) Rural Service Area.[4] Upon initial review of Sacramento's application, the Mobile Services Division (MSD) sought further information from Sacramento because it found that the "limited partnership agreement does not appear to insulate the alien limited partner from becoming involved in the management and operations of the partnership as required by Commission precedent."[5] Sacramento responded, supplying the Commission with an opinion by Sacramento's counsel that the limited partnership agreement was drafted in accordance with the California Revised Limited Partnership Act, and with declarations of Stephen Childs, Sacramento's alien limited partner, and Randall S. Butler, Sacramento's general partner, that the alien partner had not had any actual participation in the partnership. Sacramento also supplied an amendment to the limited partnership agreement whereby Childs executed an irrevocable proxy authorizing another limited partner to vote his interests in Sacramento.

3. The MSD determined that these various showings were not sufficient and concluded that Sacramento had failed to sufficiently insulate its alien limited partner. Accordingly, the MSD dismissed Sacramento's application because it violated Section 310(b)(3) of the Communications Act of 1934 and Section 22.4 of the Commission's Rules.[6] Specifically, the MSD found that Section 310(b)(3) of the Act prohibits a partnership which has a noninsulated alien limited partner from holding a Commission license, citing *Wilner & Scheiner*, 103 FCC 2d 511 (1985), *recon.*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner*). The MSD found that certain provisions of Sacramento's limited partnership agreement did not comply with the guidelines outlined in the Commissions *Attribution Reconsideration Order*, 50 Fed. Reg. 27438 (July 3, 1985) (*Attribution Rules*).[7] The MSD further rejected the statements of Childs and Butler, finding that such statements cannot overcome the failure to meet several of the explicit guidelines in the *Attribution Rules*. Finally, the MSD rejected the proxy executed by Childs because a cellular application which is defective at the time it is filed cannot later be amended to correct the defect.

4. In *Continental Cellular* we affirmed the MSD decision. We agreed that Sacramento had failed to demonstrate that its alien partner is sufficiently insulated from management and control as called for by the guidelines established in *Wilner & Scheiner* and the *Attribution Rules*. We stated that the power of the alien partner to advise the partnership in day-to-day activities and the power to vote to remove the managing general partner without cause exceed that allowed a partner fully insulated under our *Attribution Rules*.

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[1] The Commission dismissed the applications of 19 cellular applicants, including Sacramento, in *Continental Cellular*. All of the dismissed applicants, except Sacramento, appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit. The Court affirmed the dismissals in *Moving Phones v. FCC, supra*.

[2] Section 310(b)(3) states in pertinent part:

(b) No . . . common carrier . . . license shall be granted to or held by--

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives thereof or by any corporation organized under the laws of a foreign country.

[3] Section 22.4 of the Commission's Rules codifies Section 310(b)(3) of the Act.

[4] *See* Public Notice, Report No. CL-90-22 (released Oct. 26, 1989).

[5] *See* Letter to William D. Freedman from Chief, Mobile Services Division (Mar. 12, 1990).

[6] *See* Letter to William D. Freedman from Chief, Mobile Services Division (July 17, 1990) (Dismissal letter).

[7] The *Attribution Rules* Order is found also at: 58 Rad. Reg. 2d 604 (P&F) (1985).

In addition, we determined that the other documentation proffered by Sacramento did not establish compliance with the Act or our rules. For instance, we determined that the opinion of Sacramento's counsel that the limited partnership agreement was entered into in accordance with California partnership law was not sufficient to demonstrate compliance with Section 310(b)(3) because the standards for insulation under our *Attribution Rules* had not been met. Likewise, we also found the statements by Childs and Butler to be insufficient to demonstrate compliance and stated that Sacramento has failed to meet its burden in demonstrating that its alien partner is sufficiently insulated.

5. Sacramento seeks reconsideration of our Order affirming the MSD's dismissal. Sacramento argues that we applied the wrong test in our analysis and did not allow it flexibility to demonstrate that the alien limited partner does not substantially participate in the partnership's affairs. Sacramento believes the proper standard is whether the alien limited partner has in fact participated in control of the business. As shown herein, we did apply the proper standard set forth in *Wilner & Scheiner* and allowed Sacramento appropriate flexibility. Accordingly, we affirm our prior decision that Sacramento has failed to demonstrate that its alien limited partner is adequately insulated from control and management of the partnership.

II. DISCUSSION

6. In *Wilner & Scheiner* we observed that "limited partners may have the capability to exercise substantial control over business affairs."[8] Therefore, we determined that an analysis of whether the alien limited partner is sufficiently insulated from control is necessary. Specifically, we stated:

> [t]he power of a limited partner to participate in the management and operations of the partnership depends, in large part, upon the terms of the limited partnership agreement. If a limited partnership interest in a particular business conveys powers comparable to those held by an officer or director of a corporation, the prohibitions of Section 310(b) relating to alien officers and directors extend to such interests. We recognize, however, that many limited partners do not possess this type of power. Although the licensee has the burden of proving that alien limited partners do not in fact substantially participate in the management or operations of the business, we will permit it flexibility in the manner in which it chooses to demonstrate this lack of participation. Moreover, we note that in the process of revising our attribution rules, we established certain guidelines designed to assure that limited partners who qualify for an exemption from attribution are effectively insulated from the management and operations of the partnership. Because compliance with the attribution criteria effectively insulates a limited partner from participating in the control of the partnership, alien limited partners who conform to these criteria will not be subject to the restrictions governing alien officers or directors.

Wilner & Scheiner, 103 FCC 2d at 520-21, n.43 (citation omitted). This ruling in *Wilner & Scheiner* was made prior to the filing of Sacramento's application.[9] Accordingly, Sacramento had notice that we would make a determination regarding the control its alien limited partner may exercise.[10] We further determined in *Wilner & Scheiner* that the objective of Section 310(b) "reflects the broad[] purpose of 'safeguard[ing] the United States from foreign influence.'"[11] The court noted this policy in affirming *Continental Cellular* in stating that "[t]his policy against allowing aliens to have any controlling influence in a license was established long before the applications at issue were filed." *Moving Phones v. FCC*, slip op. at 7.

7. Sacramento claims that the test to determine whether an alien limited partner is sufficiently shielded from control of the operations is "'whether [sic] alien limited partners do *in fact substantially participate* in the management or operations of the business,'"[12] citing *Wilner & Scheiner* at n.43.[13] We do not agree with Sacramento. Instead, the *Wilner & Scheiner* test requires that we examine whether the alien limited partner possesses control comparable to an officer or director of a corporation. One of the factors the Commission considers to determine whether the alien partner is sufficiently insulated from control is the partnership agreement itself. As stated in *Wilner & Scheiner*, the Commission will utilize the *Attribution Rules* to ascertain the degree of insulation. As we stated in *Continental Cellular*, the alien partner in Sacramento possesses certain powers which the *Attribution Rules* deem to exceed powers held by a fully insulated limited partner.[14]

8. In *Attribution Rules* we stated that "a limited partner, to be exempt from attribution, must refrain from involvement in any material respect in the management or operation of the [partnership's] activities."[15] We held in *Continental Cellular*, and still believe, that Sacramento's alien partner has failed to show that he is insulated from such involvement. In *Attribution Rules*, we stated that

> [t]o be relieved from attribution, the limited partnership agreement should specify that the exempt limited partner cannot act as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the media enterprise of the company. . . . We will also require the limited partnership agreement to bar an exempt limited partner from serving, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises. . . . Moreover, the partnership agreement should restrict exempt limited

[8] *Wilner & Scheiner*, 103 FCC 2d at 518.

[9] Sacramento filed its application for the Texas 21 RSA on October 7, 1988.

[10] *See e.g., Moving Phones Partnership L.P. v. FCC, supra.*

[11] *Wilner & Scheiner*, 103 FCC 2d at 516-17, quoting *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P&F) 1057, 1093 (1952).

[12] Sacramento petition at 17 (emphasis in original).

[13] We note that Sacramento has inaccurately included the word "whether" in quotation marks. The word is not in the matter cited to.

[14] *See Continental Cellular*, 6 FCC Rcd at 6836-37.

[15] 58 Rad. Reg. at 618.

> partners from communicating with the licensee or the general partner on matters pertaining to the day-to-day operations of its business.

58 Rad. Reg. at 619 (footnotes omitted). We note that despite the clear restriction in our *Attribution Rules* to the powers enumerated above, Sacramento's Limited Partnership Agreement allows its alien limited partner to participate in all of the above activities. Specifically, there is no clause in the Agreement which prohibits the alien limited partner from acting as an employee of the partnership once a cellular system is constructed. Moreover, Section 9.2(a) of the Agreement expressly allows the alien limited partner to serve as a contractor or agent of the enterprise. Likewise, Section 9.2(b) of the Agreement expressly allows the alien partner to consult and advise the general partner with respect to the business of the partnership.

9. Moreover, we noted in our *Attribution Rules* that the partnership agreement should also contain restrictions on the voting powers of the limited partner in order for such partner to be considered fully insulated. We stated:

> [t]he partnership agreement may permit the exempt limited partners to vote on the admission of additional general partners, but the agreement should empower the general partner to veto any such admissions. In addition, the partnership agreement should either prohibit the exempt limited partner from voting on the removal of a general partner or limit this right to situations where the general partner is subject to bankruptcy proceedings, . . . or is adjudicated incompetent by a court of competent jurisdiction.

Id. at 619-20 (footnotes omitted). Sacramento's limited partnership agreement does not so restrict the alien partner's voting abilities. Section 11.5(c) of the agreement gives the limited partners the right to vote on the admission of additional general partners, without giving the general partner veto power over such admissions. Furthermore, Section 11.5(a)(6) empowers the alien limited partner to vote on the removal of the general partner without cause.

10. We also stated in our *Attribution Rules* that "the [limited partnership] agreement should also state, in express terms, that the exempt limited partner is prohibited from becoming actively involved in the management or operation of the media business of the partnership." *Id.* at 620. Sacramento's agreement makes no such express limitations on the alien's ability to become actively involved in the cellular enterprise. For instance, there is no restriction preventing the alien from becoming a general partner once a license is granted. For these reasons, we affirm our decision that the alien partner in Sacramento is not adequately insulated from control and management.[16]

11. Sacramento, nonetheless, argues that its alien partner should be considered only to possess control comparable to a shareholder in a corporation because of his small ownership interest (4.545 percent). Unlike the interest in a corporation, the percentage of equity in a limited partnership is not necessarily an accurate reflection of the amount of influence or control conveyed by that interest.[17] As we stated in our *Attribution Rules*, however, we believe that "it is clear that exercise of many of these activities could involve the limited partner in the affairs of the partnership to a far greater degree than is appropriate for one who has been granted total exemption from attribution on the basis of the 'passive' nature or his or her equity holding." *Id.* at 616. Furthermore, despite Sacramento's protestations, we believe that the alien partner's ability to consult with and advise the general partner on the day-to-day operations and the ability to vote on removal of the general partner without cause allows the limited partner to put the general partner under threat of removal if he does not follow the alien limited partner's advice. Sacramento was clearly forewarned in *Attribution Rules* that a limited partner who can both advise the general partner and vote to remove him or her, could, if the "advice is not adopted, . . . participate in a decision to remove the general partner." *Id.* We stated further that:

> a general partner is likely to follow the advice of a limited partner if he or she knows that the limited partner possesses the power of removal even if his or her replacement is subject to Commission approval. Therefore, the power of removal, even if it is a "contingent" right, potentially provides a limited partner with the ability to control, or at least to materially influence, partnership affairs.

Id. at 617, n.51. Moreover, in *Wilner & Scheiner*, we specifically rejected the argument that because "a limited partner is incapable of exercising control over the partnership [because of the degree of equity control] . . . an exclusion from the scope of the statute is consistent with the underlying legislative purpose." *Wilner & Scheiner*, 103 FCC 2d at 516. We specifically stated that in addition to voting and equity ownership, partnership interests may convey power to direct or manage operations of the company. *Id.* at 520, n.43. Because Sacramento had notice of our long standing policy involving the insulation of limited partners, we reject its argument that its alien partner's power is comparable only to a shareholder of a corporation.

12. Based on the above discussion, it is clear that the Sacramento limited partnership agreement does not comply with the standards established in our *Attribution Rules*.[18] Sacramento, however, is correct that the question of whether the limited partnership agreement adequately

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[16] In its petition, Sacramento protests that the Commission only gave two reasons for not finding its alien sufficiently insulated. The two factors mentioned in *Continental Cellular*, that the alien can advise the partnership in day-to-day activities and may vote to remove the general partner for cause, are examples as to why Sacramento had not provided adequate insulation for its alien partner. Because we had established that Sacramento had not met the guidelines established in our *Attribution Rules* by way of those examples, we did not then and do not now need to go any further and list every factor in which Sacramento's limited partnership agreement failed to provide sufficient insulation.

[17] As a consequence, even a limited partner who possesses a large equity interest may be effectively insulated from actual control over the business. *See Wilner & Scheiner*, 103 FCC 2d at 522, n.49.

[18] We stated in *Wilner & Scheiner* that alien limited partners who comply with the attribution criteria are effectively insulated and will, therefore, not be subject to the restrictions

insulates the alien partner is not the only matter we will examine. Our determination does "depend[], in large part, upon the terms of the limited partnership agreement." *Id.* at 520, n.43. The burden is on Sacramento to demonstrate that it is in compliance with Section 310(b)(3) of the Act. When we examine the other information proffered by Sacramento, however, we reach the same conclusion that Sacramento has not demonstrated that its alien limited partner is sufficiently shielded from control and management of the business. As a part of its showing, Sacramento submitted a statement from Butler, its general partner, that since the formation of the partnership, the alien limited partner has not had any participation in the affairs of the partnership. Sacramento also submitted a statement from Childs, its alien limited partner, that since the formation of the partnership he has not had any involvement in the management or operation of the business of the partnership.

13. Neither statement submitted by Sacramento is helpful or dispositive. The mere fact that the alien *has not* been involved in the management or control of the partnership at the time the statements were written in no way substantiates that the alien *cannot* become involved in the management and control of the partnership.[19] As shown above, the limited partnership agreement certainly gives the alien the power to become so involved. Moreover, the general partner in his statement that the alien has not been involved stated further that there had been no formal meetings and no votes had been taken in which any limited partner participated. Therefore, the alien's lack of participation has little meaning. There have been no actions taken that he (or any other partner for that matter) could have influenced. The alien is not restricted from participation which violates Section 310(b)(3) of the Act. We properly found these declarations to be unpersuasive in our previous Order.

14. We also properly rejected the amendment whereby Sacramento alien partner issued a proxy to another Sacramento partner. As we stated in *Continental Cellular*, we have consistently construed Section 22.918(b) to prohibit post-lottery amendments to cure acceptability defects.[20] The U.S. Court of Appeals upheld this portion of our *Continental Cellular* decision.[21]

15. Finally, we were also correct in concluding that the self-serving opinion by Sacramento's counsel that the limited partnership agreement complies with California partnership law has no bearing in the determination concerning Section 310(b). As we stated in *Continental Cellular*, it is irrelevant that the agreement complies with California law because our standards for insulation had not been met. Additionally, as the staff noted in the dismissal letter, "in the *Attribution [Rules]*, the Commission clearly indicated that compliance with the Uniform Limited Partnership Act was not enough to show insulation. Consistent with this Commission conclusion, compliance with the California Limited Partnership Act, by itself, is insufficient to demonstrate that [the alien partner] is an insulated limited partner for purposes of compliance with Section 310(b) of the Act." Dismissal letter at 2. The interests at issue under Section 310(b)(?) of the Act are different than those addressed by state partnership statutes.[22] Because of Sacramento's failure to meet a number of the specific criteria for insulation, we disagree with its counsel's conclusion that the alien partner is in a position more comparable to that of a shareholder.

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governing alien officers and directors. *Wilner & Scheiner*, 103 FCC 2d at 520-21, n.43. While the converse (an alien partner not conforming to the criteria is not adequately insulated) is not necessarily true, the burden is upon the applicant to establish that the alien is sufficiently insulated when the attribution criteria are not met.

[19] Additionally, the probative value of the alien limited partner's statement that he has not been actively involved in the business is minimal. According to Section 3 of the limited partnership agreement, the purpose of the partnership is "to obtain a cellular construction permit for each application selected and to construct and operate a cellular communications system . . ." Limited Partnership Agreement at 1. Because none of Sacramento's applications has been awarded construction permits, there appears to have been no business conducted in which the alien partner could have participated.

[20] *See Continental Cellular*, 6 FCC Rcd at 6835.

[21] *See Moving Phones Partnership L.P. v. FCC*, slip op. at 11.

[22] On March 13, 1992, Sacramento filed a Supplement to Petition for Reconsideration accompanied with a Motion for Leave to File. Sacramento asserts in its Motion that the Commission's Notice of Proposed Rule Making in *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, FCC 92-96, MM Docket No. 92-51 (released April 1, 1992) (NPRM), supported its position in its Petition. Sacramento states that the NPRM allows limited partners to make a demonstration to overcome the presumption that an alien limited partner is not sufficiently insulated if the guidelines of *Wilner & Scheiner* are not met. Sacramento has failed to advanced any convincing argument for the acceptance of the Supplement. Moreover, the Supplement does not raise any matters not considered herein. Accordingly, pursuant to Section 1.106(f), the Motion for Leave to File Supplement is denied and the Supplement is dismissed. On October 12, 1993, Sacramento filed a Further Supplement to Petition for Reconsideration accompanied with a Motion for Leave to File. In this further supplement, Sacramento argues that recent cases support its claim. Specifically, Sacramento states that the Commission's decision in *Catherine L. Waddill*, 8 FCC Rcd 2169 (1993), to not revoke the licenses of G.M.D. Partnership despite the fact that the partnership contained non-insulated alien partners shows that the Commission should have allowed Sacramento to amend its application. The facts in *Waddill* are inapposite. G.M.D. was already granted licenses; Sacramento has not been. The fact that the Commission erred in granting G.M.D. despite the presence of noninsulated alien partners is no basis for granting Sacramento. Moreover, the *Waddill* case reaffirms the fact that the Commission believes that alien limited partners must be adequately insulated from control. Sacramento also argues that the U.S. Court of Appeals held that the Commission's Rules must be in "plain and comprehensible English." *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) As shown above, our alien ownership rules are clear and we did afford Sacramento ample flexibility to demonstrate that its alien partner was insulated from control. Finally, Sacramento argues that the U.S. Court of Appeals based its decision in *Moving Phones Partnership v. FCC*, No. 91-166 slip op. (D.C. Cir. July 30, 1993), on that Section 310(b) of the Act precluded participation of alien *general* partners. Of course the Court addressed general partners in its decision because the *Moving Phones* case was comprised of only general partnerships. Because the Supplement fails to raise any matters which warrant further consideration, the Motion for Leave to File is denied and the Further Supplement is dismissed.

III. CONCLUSION AND ORDERING CLAUSES

16. In conclusion, we find that Sacramento has not presented any basis for reconsideration of our previous decision. Based upon our review of the record we have determined that the alien partner is not insulated from control consistent with the *Attribution Rules*. The alien partner is in a position to control certain aspects of the partnership and the partnership agreement does not limit these powers to the extent necessary for us to consider him adequately insulated. We have allowed Sacramento flexibility in making its showing. However, the other factors proffered by Sacramento do not change our determination as discussed above.

17. Accordingly, IT IS THEREFORE ORDERED that the Motion for Leave to File Supplement to Petition for Reconsideration IS HEREBY DENIED and the Supplement to Petition for Reconsideration IS HEREBY DISMISSED.

18. IT IS FURTHER ORDERED that the Motion for Leave to File a Further Supplement to Petition for Reconsideration IS HEREBY DENIED and the Further Supplement to Petition for Reconsideration IS HEREBY DISMISSED.

19. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Sacramento RSA Limited Partnership IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HUGHES COMMUNICATIONS GALAXY, INC. File No. DBS-84-02/93-04

For Authority to Construct Ground Spare Satellite for Direct Broadcast Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1994; Released: July 7, 1994

By the Chief, Video Services Division, Mass Media Bureau:

1. Hughes Communications Galaxy, Inc. ("Hughes"), is currently authorized to construct a Direct Broadcast Satellite ("DBS") system consisting of three satellites. Two satellites are to be located at orbital position 101°W and are to provide 27 channels of eastern half-CONUS[1] or full-CONUS[2] DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29 and 31. The third satellite is to be located at orbital position 157°W and is to provide 27 channels of western half-CONUS DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 28, 30 and 32. *Advanced Communications Corporation*, 6 FCC Rcd 2269, 2270, 2274 (1991), as modified in *United States Satellite Broadcasting Company, Inc.*, 7 FCC Rcd 7247 (1992). Now under consideration is the above-captioned application seeking authority to construct a DBS satellite to serve as a ground spare for the two satellites to be located at orbital position 101°W. No oppositions or comments have been filed.

2. Hughes states that the proposed ground spare will be capable of replacing either of the satellites already authorized to be located at orbital position 101°W, and that construction of the requested ground spare would enable it to rapidly initiate or reinstate service if such service should be delayed or interrupted due to a launch or in-orbit failure of either satellite. In the absence of an available ground spare, Hughes asserts that such launch or in-orbit failure could result in a two-to-four year delay in the initiation or restoration of its DBS service. Attached to Hughes' construction permit application is, *inter alia*, a detailed description of the design characteristics and technical specifications of the requested ground spare satellite.

3. In case of system failure, the emergency replacement capacity which would be provided by the requested ground spare satellite would, in fact, facilitate the rapid initiation or restoration of service to Hughes' customers. Further, Hughes is legally, technically, financially and otherwise qualified to construct the proposed ground spare satellite. Therefore, grant of Hughes application for authority to construct a ground spare satellite would serve the public interest, convenience and necessity.

4. Accordingly, IT IS ORDERED That the Application of Hughes Communications Galaxy, Inc., for Authority to Construct a Ground Spare DBS Satellite, File No. DBS-84-02/93-04, in accordance with the design characteristics and technical specifications contained in that application, IS GRANTED, subject to the same conditions as (i) Hughes' outstanding license for DBS Facility DBS-84-02, issued June 3, 1994; and (ii) Hughes outstanding construction permit for the remainder of its authorized DBS system.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

[1] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[2] Four of the DBS orbital positions assigned to the United States under international treaties and agreements, 61.5°W, 101°W, 110°W and 119°W, may be technically suitable for delivering full-CONUS DBS service. The Commission conditionally authorized full-CONUS signals from these orbital positions pending final confirmation of their compliance with the United States' obligations under international treaties and agreements. *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6294, 6300-01 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liberty Communications Inc. File No. 316ms0029

Notice of Apparent Liability for Forfeiture Penalty for Station KNKC427 in the Public Land Mobile Service at Tallahassee, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1994; Released: July 7, 1994

By the Chief, Mobile Services Division:

1. Liberty Communications Inc. (Liberty) has filed a request for reduction of the "Notice of Apparent Liability for Forfeiture" issued by the Chief, Mobile Services Division (MSD) for $4,000. *Liberty Communications Inc.*, 8 FCC Rcd 7255 (Mobile Serv. Div. 1993) (*NALF*). For the reasons discussed below, we are cancelling the *NALF*.

2. On November 6, 1991, the Commission granted an authorization to Liberty to operate on frequency 152.03 MHz at Tallahassee, Florida. The expiration date of the authorization was November 6, 1992. On November 16, 1992, Liberty filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement of the authorization for the facility. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

3. In the *NALF*, the MSD found that because Liberty commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules, and that Liberty's failure to file the FCC Form 489 until November 16, 1992, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Moreover, the MSD stated that pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *petition for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed Aug. 23, 1993) (*Forfeiture Policy Statement*), the base forfeiture amount for failing to file required forms was $20,000, but that the forfeiture was being adjusted downward by $10,000 because the violation is a relatively minor one and by an additional $6,000 because Liberty voluntarily disclosed its failure to file the FCC Form 489. As a result, the MSD assessed a $4,000 forfeiture.

4. Liberty asserts that prior to issuance of the NALF, Liberty never was cited for any violation of the Commission's Rules and, thus, has a history of overall compliance, which should reduce the forfeiture.

5. There is no dispute that Liberty failed to timely file a FCC Form 489. Nonetheless, we accept its contention that the forfeiture should be adjusted downward for its "history of overall compliance" because Commission files do not contradict Liberty's assertion of such history prior to issuance of the *NALF*. Consequently, because the minimum downward-adjustment percentage, when applied to the $20,000 base forfeiture amount, equals $4,000 and is the same amount as the *NALF*, we are cancelling the forfeiture.[1]

6. Accordingly, IT IS ORDERED that the request for reduction filed by Liberty Communications Inc. in the captioned proceeding IS GRANTED.

7. IT IS FURTHER ORDERED that the Notice of Apparent Liability issued to Liberty Communications Inc. IS CANCELLED.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Liberty Communications Inc., 4224 East West Highway, Chevy Chase, Maryland 20813, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] In light of our action cancelling the *NALF*, we need not summarize and address other issues raised in Liberty's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

TKR CABLE COMPANY

Petition for Stay
State of New Jersey
Board of Regulatory Commissioners

ORDER

Adopted: June 22, 1994; Released: June 23, 1994

By the Chief, Cable Services Bureau:

1. TKR Cable Company ("TKR") filed a Petition for Stay on May 16, 1994, requesting that the Commission stay the State of New Jersey Board of Regulatory Commissioners from ruling on the status of TKR's current a la carte offerings. On June 1, 1994, The New Jersey Board of Regulatory Commissioners, Office of Cable Television ("N.J. Board") filed an Opposition to Petition for Stay, urging the Commission to reject TKR's petition.

2. TKR argues in its petition for stay that the N.J. Board should be precluded from making any determination addressing the regulatory status of TKR's a la carte offerings on TKR cable systems in New Jersey until the Commission has resolved the issues raised in a Letter of Inquiry to TKR concerning its a la carte offerings.[1] TKR presents three reasons for the Commission to take this action. First, TKR argues that because the N.J. Board did not rule on TKR's a la carte package within the first sixty (60) days of its extended review period, as provided for under the Commission's revised rules, it should not be allowed to do so now. Secondly, TKR asserts that the N.J. Board should not be able to make an a la carte determination as part of its rate order because it has previously filed a complaint seeking a ruling by the Commission on this issue. Lastly, TKR contends that in order to ensure regulatory consistency, the N.J. Board should not be able to take any action that would conflict with the Commission's resolution of the Letter of Inquiry regarding the same issue.

3. The Commission evaluates petitions for stay under well-settled principles. To support a stay, a petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[2] As described below, resolution of this particular stay rests mainly on the strength of petitioner's argument concerning the second prong of this test.

4. TKR's petition does not establish that TKR will suffer irreparable harm if a stay is not granted. First, no decision has been rendered by the N.J. Board regarding TKR's a la carte offerings. The Commission is not in a position to engage in conjecture about the possible array of decisions that a local franchising authority may make when the authority has not yet acted. Moreover, TKR has not established that it will experience undue hardship if the N.J. Board is left free to issue a rate order. In the event that the N.J. Board renders a decision that TKR believes is illegal or unreasonable, TKR will have the opportunity to appeal that decision to the Commission at the proper time. Therefore, although this petition for stay is being denied, TKR will not be left without a viable remedy to challenge any future action taken by the N.J. Board.

5. Under the Commission's rules, the Commission is given appellate authority to rule on the reasonableness of a local franchising authority's local rate order. *See* 47 C.F.R. § 76.944. However, TKR has cited no authority in support of the Commission's plenary power to issue stays prohibiting local franchising authorities from issuing specific orders. The Commission's appellate role is to review the decisions rendered by local franchising authorities, but not to prevent them from first making those decisions. Therefore, a ruling by the Commission at this time would be premature.

6. Accordingly, IT IS ORDERED, that the Petition for Stay filed by TKR Cable Company IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

7. IT IS FURTHER ORDERED that this *Order* is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] *See* Letter of Inquiry, TKR Cable Company of Hamilton, NJ, LOI-93-31 (issued December 13, 1993).

[2] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BARBOUR COUNTY BOARD OF EDUCATION
Society Hill, AL — File No. BPLIF-920320DG

MONTGOMERY PUBLIC SCHOOL SYSTEM
Montgomery, AL — File No. BPLIF-920515DR

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels A1-A4

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1994; **Released: July 7, 1994**

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Barbour County Board of Education (Barbour) and Montgomery Public School System (Montgomery) for a construction permit and license on Channels A1-A4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve the areas of Society Hill and Montgomery, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Montgomery is accredited by the Alabama State Department of Education and is applying to provide ITFS service to its own students. While Barbour is not itself local to the Montgomery area, the applicant has submitted the requisite letters of intended use from accredited schools that will use its service and has documented the establishment of a local programming committee in the community.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Montgomery is entitled to four points for being a school district serving the formal educational needs of schools within its jurisdiction. Barbour, based in Clayton, Alabama, seeks to serve the Macon County area. Because its headquarters is not located within the area it proposes to serve, Barbour is not entitled to points for being a local applicant.

Accreditation. Montgomery is entitled to three points because it is accredited by the Alabama State Department of Education and intends to serve its own students. Although Barbour proposes to serve accredited institutions, a factor which satisfies its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

factor necessary for earning merit points under the accreditation criterion. Therefore, Barbour is not entitled to any points by this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523,* 59 RR 2d 1355, 1370 (1986); and *Unified School District #511,* 8 FCC Rcd 7060, 7061 (1993).

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Montgomery's illustrative schedule and its program grid both propose an average of 21 hours of formal ITFS programming per channel per week. Thus, Montgomery is entitled to one programming merit point. Barbour's illustrative schedule and its program grid both propose an average of 24.4 hours of formal ITFS programming per channel per week. Thus, Barbour is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Montgomery is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Barbour is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of three points. Thus, the tentative selectee is Montgomery.[3]

OTHER MATTERS

5. Montgomery proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Capital Cable Television, Inc. (CCTV), two of whose provisions do not comply with the Commission's requirements for such leases. First, the lease provides for an initial term of two years from the date CCTV "receives notice from [Montgomery] that [Montgomery] has notified the FCC of the completion of construction of [its] station," with four automatic renewal terms of two years each. This provision is inconsistent with the Commission's maximum term for excess capacity leases because it extends beyond the term of the license. *Instructional Television Fixed Service - Report and Order in Gen. Docket Nos. 90-54 and 80-113,* 5 FCC Rcd 6410, 6416 (1990). Second the lease does not include a provision which would afford the licensee an opportunity to purchase or lease the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. See *Turner Independent School District,* 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. See *Milwaukee Regional Medical Instructional Television Station, Inc.,* 2 FCC Rcd 1472, 1473 (1987). Accordingly, Montgomery's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, no petitions to deny or informal objections have been filed against Montgomery's application.

6. We find Montgomery fully qualified to be an ITFS licensee and conclude that grant of Montgomery's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Barbour County Board of Education (BPLIF-920320DG) IS DENIED, the petition to deny the Barbour application IS DISMISSED as moot, and the application of Montgomery Public School System (BPLIF-920515DR) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Montgomery submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Montgomery filed a petition to deny the Barbour application. Because we have tentatively selected Montgomery as the winning applicant, we find it unnecessary to consider Montgomery's petition. Accordingly, we will dismiss this petition as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DANNY'S TWO WAY COMMUNICATIONS, INC. d/b/a DAN COMM PAGING — File No. 24956-CD-P/01-90

For facilities in the Public Land Mobile Service at Middletown, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: July 8, 1994

By the Commission:

I. INTRODUCTION

1. In this order, we address an application for review filed by Danny's Two Way Communications, Inc. d/b/a Dan Comm Paging (Dan Comm). In its application for review, Dan Comm requests that we overturn the order of the Chief, Common Carrier Bureau, in *Dan Comm Paging*, 7 FCC Rcd 518 (1992) (*Bureau Order*), *affirming Dan Comm Paging*, 6 FCC Rcd 3550 (Mobile Serv. Div. 1991) (*Division Order*). For the reasons discussed below, we deny Dan Comm's application for review.

II. BACKGROUND

2. Dan Comm filed an application to establish facilities on frequency 152.66 MHz at Middletown, Ohio. USA Mobile Communications, Inc. II (USA Mobile) sought dismissal of Dan Comm's application, claiming that USA Mobile was already licensed for that frequency at Middletown. Dan Comm responded that USA Mobile's authorizations on that frequency had expired by operation of law under Section 22.303 of the Commission's Rules[1] because the frequency had been abandoned. The *Division Order* determined that a license terminates only after the Commission takes formal action, and USA Mobile's authorization at Middletown had not been terminated. It concluded, therefore, that the frequency was not available and dismissed Dan Comm's application.

3. Dan Comm filed a petition for reconsideration of the *Division Order*. In ruling on that petition, the *Bureau Order* determined that Section 22.303 does not provide that an authorization automatically expires upon abandonment of a station, but rather requires that the licensee forward the authorization to the Commission so that it can be cancelled. The *Bureau Order* concluded that until the Commission terminates the authorization by some official act, such as by issuance of a public notice, the authorization remains in effect and the frequency is unavailable to others. Accordingly, the *Bureau Order* affirmed the *Division Order*.

III. DISCUSSION

4. Dan Comm's application for review of the *Bureau Order* asserts that the Commission cannot lawfully interpret Section 22.303 of the Rules to require an independent act of termination by the Commission for purposes of Part 22 licenses while at the same time construing a substantively identical rule, *viz.*, Section 90.157, to result in automatic termination of an authorization not requiring an independent act of termination by the Commission. Dan Comm observes that the Notice of Proposed Rule Making in PR Docket No. 90-481, *Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations*, 5 FCC Rcd 6401 (1990) (*NPRM*), interpreted the language of former Section 90.157 of the Rules as stating that a Part 90 private radio license becomes null and void if the station involved has discontinued operation for one year or more and that the actual forwarding of the license to the Commission is purely a ministerial function.[2] Literally, former Section 90.157 stated that if a Part 90 station discontinued operation on a permanent basis, the licensee should forward the station license to the Commission for cancellation and also stated that any station which had not operated for one year or more was considered to have been permanently discontinued. Dan Comm argues that the *NPRM*'s interpretation is a valid, binding interpretation of the explicit language of former Section 90.157 and constitutes an adjudication of the legal issue binding with respect to any exercise of delegated authority.

5. Further, Dan Comm claims that relevant public interest policy considerations support automatic termination. Thus, Dan Comm asserts that permitting a Part 22 licensee to hoard a channel for which other carriers have a critical need is just as contrary to the public interest as it is in the case of a Part 90 licensee. Dan Comm also contends that the *Bureau Order* 's interpretation is inconsistent with the Commission's adoption of a "finder's preference," which provides incentives to private parties to assist the Commission in the recovery of private land mobile spectrum previously licensed but unused. *See Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations*, 6 FCC Rcd 7297, 7302-04 (1991) (*Report and Order*).

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[1] Section 22.303 states:

> If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, any station which has not operated for 90 continuous days is considered to have been permanently discontinued, unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period and provided a date when operation will resume, which shall not be in excess of 30 additional days.

[2] *See* paragraph 6 of the *NPRM*.

6. In opposition to Dan Comm's application for review, USA Mobile asserts that the *Bureau Order* 's determination that a license terminates only after the Commission takes formal action is based on well-reasoned precedent and notions of fairness. USA Mobile observes that the policy of providing public notice of license terminations promotes fairness to the licensee whose license is being terminated by giving it the opportunity to contest the termination. Moreover, USA Mobile contends, the policy is fair to the public since public notice gives all potential applicants an opportunity to file for the frequency.[3] USA Mobile also argues that similar language in Section 22.303 and former Section 90.157 of our Rules does not justify similar regulatory treatment of Part 90 and Part 22 licensees. Rather, USA Mobile believes that the Common Carrier Bureau was correct in acknowledging that policies regarding Part 90 licenses should not be applied automatically to the regulation of radio common carriers.

7. We concur with the *Bureau Order* 's conclusion that Dan Comm's application was properly dismissed as premature, although for different reasons. Section 22.303 of the Rules states that if a licensed station discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. That rule section also states that a station that has not been operated for 90 continuous days is considered to have permanently discontinued operation, unless the licensee informs the Commission otherwise prior to the expiration of the 90 day period. Earlier in this proceeding, USA Mobile alleged that it was operating its station during the period in question, but Dan Comm argued to the contrary.[4] In light of this conflicting evidence, the Chief, Mobile Services Division, Common Carrier Bureau, requested further information from USA Mobile,[5] and USA Mobile responded to that request.[6]

8. The two principal purposes behind Section 22.303 of the Rules are to prevent licensees from hoarding spectrum and to make unused spectrum available to other potential licensees. Both licensees that are not providing service to the public and licensees that have ceased operation altogether fall within the provisions of Section 22.303. We agree with Dan Comm that the interpretation of a similar private radio rule in the *NPRM* in PR Docket No. 90-481 applies here and that Section 22.303 should be read to provide for automatic cancellation of a license for a facility that has not been providing service to the public for more than 90 days. By the terms of Section 22.303, the only exception to such automatic cancellation is if the licensee has notified the Commission prior to the expiration of that 90-day period that it does not intend to cease operating on a permanent basis and provides a date when operation will resume, which date shall not be in excess of 30 additional days.

9. The focus of the "discontinuance of service" debate between Dan Comm and USA Mobile in their various pleadings and letters to the Commission has been primarily on the issue of whether USA Mobile ceased all technical operation on frequency 152.66 MHz at Middletown, Ohio. USA Mobile has taken the position that it was operating that frequency during the period in question, *i.e.*, January through April 1990. Nevertheless, it appears that USA Mobile has conceded the point that it was not providing service to the public on 152.66 MHz during the period in question but was merely providing "channel identifying communications and periodic testing."[7] Thus, we find that the record in this case demonstrates that USA Mobile ceased to provide service to the public on frequency 152.66 MHz for a four-month period. Accordingly, its license for that frequency expired pursuant to Section 22.303 of the Rules.

10. As USA Mobile explains, however, after acquiring many stations and frequencies from a number of different licensees, it had to determine how best to provide coverage for USA Mobile's customers in the Cincinnati-Dayton area. During the period following its acquisitions, USA Mobile used its stations in different ways at different times, sometimes transmitting identifying signals while a particular station was being integrated into the entire USA Mobile paging network.[8] In light of the particular facts of this case, we conclude that even though USA Mobile's authorization expired automatically because frequency 152.66 MHz at Middletown, Ohio was not utilized to serve the public for a period exceeding 90 days, there are sufficient reasons presented by this case to justify waiver, on our own motion, of Section 22.303 with respect to USA Mobile's authorization and to reinstate that authorization *nunc pro tunc*. *Cf. T-Com, Inc.*, 5 FCC Rcd 6691 (1990).

11. We find that waiver is in the public interest for several reasons. First, Section 22.303 of the Rules does not explicitly state that a Part 22 authorization expires automatically upon discontinuance of service for a specific period. The language of Section 22.303 of the Rules is

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[3] USA Mobile quotes language to this effect from *Public Mobile Services Lottery*, 5 FCC Rcd 7430, 7433-34 n.18 (Com. Car. Bur. 1990).

[4] The period in question, as alleged by Dan Comm, is the period begining January 1, 1990 and ending April 30, 1990. Both parties supported their allegations with appropriate documentation. USA Mobile provided affidavits, while Dan Comm provided unsworn declarations under penalty of perjury pursuant to 47 C.F.R. §1.16.

[5] *See* letter dated June 12, 1991, from G. Vogt, Chief of the Mobile Services Division, Common Carrier Bureau, addressed to J. Urff, counsel to USA Mobile.

[6] *See* letter and other documents submitted by USA Mobile to the Commission on July 2, 1991. USA Mobile requested that certain exhibits attached to its response not be made available to the public because of the proprietary nature of the information provided in those exhibits. Since we have not yet ruled on that request, and because in light of our disposition herein we need not do so, those exhibits will remain in a non-public file and will not be discussed further. *See* 47 C.F.R. § 0.457. Nevertheless, at the request of the Commission's staff, USA Mobile served a copy of its response on Dan Comm, which commented on that response. In a letter dated July 17, 1991, counsel for Dan Comm argues generally that USA Mobile's response of July 2, 1991, confirms Dan Comm's discontinuance allegation.

[7] *See* footnote 2, page 2 of a letter dated August 21, 1991, to D. Searcy, Secretary of the Federal Communications Commission, from USA Mobile; affidavit of Edward L. Burberry dated October 9, 1990, and attached to USA Mobile's "Reply To Motion For Leave To Supplement The Record," filed October 11, 1990; and affidavit of Joseph Truster dated August 13, 1990, and attached to USA Mobile's "Reply To Opposition To Petition To Dismiss Or Deny," filed August 14, 1990.

[8] *See* USA Mobile's "Reply To Motion For Leave To Supplement The Record," pages 4-5.

ambiguous in this regard.[9] Second, Section 22.303 states literally that a station that has not "operated" for 90 continuous days is considered to have been permanently discontinued, but does not state that failure to provide service to the public for 90 days constitutes failure to "operate." To our knowledge, the case before us is the first instance in which we have defined failure to provide service to the public as failure to "operate" within the context of Section 22.303. Thus, USA Mobile's asserted use of the frequency at issue here for channel identifying communications and periodic testing does not constitute "operation" for purposes of Section 22.303. USA Mobile did not have prior notice of this interpretation, however, and waiver is therefore justified.

12. Third, while we agree with Dan Comm that the *NPRM* in PR Docket No. 90-481's interpretation of a similar private radio rule applies here and that Section 22.303 should in fact be read to provide for automatic cancellation, the *NPRM* in PR Docket No. 90-481 was not released until November 1990, which was several months after the events at issue here occurred. USA Mobile had no explicit notice prior to that date that the Commission considered discontinuance of service to the public for a three month period to result in automatic termination of the license for the frequency in question. We note that Dan Comm's application was filed in May 1990, whereas the *NPRM* in question was released on November 1, 1990. Thus, Dan Comm cannot claim that it relied on the *NPRM* 's interpretation of language in former Section 90.157 of our Rules, which is similar to language in Section 22.303 of our Rules, at the time it filed its application. Nevertheless, in future cases, we shall interpret Section 22.303 of the Rules to mean that the license for a particular facility has expired automatically if the licensee in question has failed to provide service to the public for more than 90 days, unless the licensee has notified the Commission that it does not intend to cease operation permanently and provides a date when operation will resume, which shall not be in excess of 30 additional days.

13. Finally, we note once again that the two chief purposes of the automatic cancellation provisions of Section 22.303 are to avoid spectrum hoarding and to make unused spectrum promptly available for future use. Our decision to waive the rule here does not undermine these purposes. There is no evidence that USA Mobile was hoarding spectrum. Indeed, USA Mobile returned several other licenses for cancellation when it determined that it no longer needed them in its reconfigured system.[10] Further, USA Mobile is now clearly providing service to customers on the frequency at issue. Moreover, under these circumstances, we do not believe the purpose of the rule would be served by cancelling the license or that it will be disserved by reinstatement. Given USA Mobile's lack of notice of our present interpretation of this rule, and its good faith efforts to comply with the rule by submitting other authorizations for cancellation, we do not believe it would be equitable to cancel this authorization nor do we believe the public interest would be served by such action. We caution other parties, however, that our waiver in this case should not be read as indicating that we will not strictly enforce Section 22.303 in the future with respect to licensees who are now on clear notice that the rule provides for automatic cancellation.

14. We recognize that our action here is not perfectly consistent with the policy underlying the "finder's preference" adopted for Part 90 licensees. We are committed to identifying unused spectrum and making these frequencies available as expeditiously as possible. Nevertheless, the Part 90 finder's preference rules do not apply to this service. Further, we have proposed, but not adopted, a "finder's preference" to provide incentives to private parties to assist us in the recovery of Part 22 spectrum previously licensed but unused. *See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Notice of Proposed Rule Making (Part 22 NPRM)*, 7 FCC Rcd 3658, 3660 (1992). As explained in the *Part 22 NPRM*, 7 FCC Rcd at 3687, if an applicant files an application under existing procedures for a channel that is licensed but not currently being used, we would dismiss it as defective. Under the proposed "finder's preference" procedures, an applicant could file a "finder's" application for a Public Mobile Radio Service channel that is assigned but is not currently being used. Dan Comm, however, cannot take advantage of the "finder's preference" procedures for Part 22 licensees before they have been established. Thus, Dan Comm's application was properly dismissed as premature.

IV. CONCLUSION; ORDERING PARAGRAPH

15. In light of the foregoing discussion, we conclude that Dan Comm's application was properly dismissed as premature. We also find that USA Mobile's license for its 152.66 MHz frequency at Middletown, Ohio, expired pursuant to Section 22.303 of our Rules. Nevertheless, we waive Section 22.303 of our Rules and reinstate that license *nunc pro tunc* for the reasons stated above.

16. Accordingly, IT IS ORDERED that the application for review filed by Danny's Two Way Communications, Inc. d/b/a Dan Comm Paging in the captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[9] The *Report and Order* in PR Docket No. 90-481 changed the language of former Section 90.157 to state explicitly that a private land mobile radio license cancels automatically upon discontinued operation for a period of one year or more. Paragraph 6 of the *NPRM* in that docket recognized that the language of former Section 90.157 was not clear as to whether a license expired automatically. Similarly, we have proposed to amend the provisions of Section 22.303 to make them more explicit. *See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Notice of Proposed Rulemaking (Part 22 NPRM)*, 7 FCC Rcd 3685 (1992) (proposed rule sections 22.144 and 22.317).

[10] *See, e.g.*, Letter to D. Searcy, Secretary of the Federal Communications Commission, from J. Urff, counsel for USA Mobile, deleting the frequency 35.22 MHz at 19 locations licensed under Station KLF577 (letter dated February 20, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Computer III Remand Proceedings Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards	**CC Docket No. 90-623**
Filing and Review of Open Network Architecture Plans	**CC Docket No. 88-2 Phase I**

ORDER

Adopted: June 27, 1994; Released: June 27, 1994

By the Chief, Policy and Program Planning Division, Common Carrier Bureau:

1. In our May 1993 order granting Pacific Bell relief from structural separation requirements, we granted Pacific a temporary waiver of its obligations under Open Network Architecture (ONA) to tariff interstate and intrastate caller ID services.[1] By its terms, the waiver expires 90 days after the Commission reached its decision in CC Docket No. 91-281, the caller ID proceeding. On March 29, 1994, the Commission released its *Caller ID Order*.[2] Pacific petitioned the Commission on May 24, 1994, to extend this waiver indefinitely. Pacific asserts that although its waiver is scheduled to expire on June 27, 1994, the *Caller ID Order* did not resolve the regulatory incompatibility that was the basis for the grant of the initial waiver.

2. Pacific argues that the *Caller ID Order* creates a jurisdictional conflict for Pacific because it establishes per-call blocking as the only blocking standard available on interstate calls[3] while the California Public Utilities Commission's (CPUC's) order requires that customers be given their choice of three blocking options.[4] Pacific asserts that the technology does not exist to accommodate simultaneously the different blocking options that the two jurisdictions require,[5] and a preliminary estimate of the cost of developing and deploying the technology indicates that it would cost at least $100 million and not be available until 1997.

3. Five parties filed comments on the waiver request. The People of the State of California and the CPUC ("California") support an indefinite waiver, but for different reasons than those given by Pacific. California states that it has presented expert testimony in its May 17, 1994 Petition for Reconsideration and Clarification and Comments on the *Caller ID Order* demonstrating that both state and federal policies governing caller ID service can technically and feasibly co-exist with minimal cost. Yet, California supports the waiver request because it would permit Pacific to delay the installation of the software necessary for privacy protection until the Commission's caller ID rules go into effect, in April 1995. This would permit at least some installations to be made in conjunction with scheduled generic software upgrades, making them less costly.

4. AT&T acknowledges that it may not be technologically feasible for carriers to comply with inconsistent interstate and intrastate blocking regimes, but it opposes an indefinite waiver for Pacific. It argues that an indefinite waiver would prejudice the reconsideration of the *Caller ID Order*. Still, it states that it does not oppose an extension of Pacific's temporary waiver until the relevant issues in the *Caller ID Order* are resolved on reconsideration or until the order's requirements go into effect in April 1995, whichever comes first. MCI suggests that the Commission preserve the *status quo* by granting Pacific an extension of its waiver for a period of time terminating ninety days after release of its decision on reconsideration of the *Caller ID Order*. Nextel Communications, Inc. argues that Pacific's petition highlights the need for Commission preemption of all state regulation of caller ID services to the extent that those regulations are inconsistent with the Commission's caller ID policy, and it urges such preemption. Short of that, however, Nextel states that it does not oppose an interim extension of Pacific's existing waiver pending resolution of the conflict between inconsistent state and federal regulation.

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[1] Pacific Bell and Nevada Bell, Notice and Petition for Removal of Structural Separation Requirement and Waiver of Certain Federal and State Tariffing Requirements, CC Docket Nos. 90-623 & 88-2, Phase I, Memorandum Opinion and Order, 8 FCC Rcd 3982, 3983 at para. 6, 3984 at n.22 (1993). The two "caller ID" ONA services subject to the waiver are Calling Number Delivery via Individual Calling Line Identification and Calling Number Delivery via Bulk Calling Line Identification. Pacific must provide both services, absent a waiver. *Id.* at 3982 at para. 5.

[2] Rules and Policies Regarding Calling Number Identification Service - Caller ID, CC Docket No. 91-281, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 1764 (1994) (*Caller ID Order*).

[3] Pacific cites to *Caller ID Order*, at 1771-72 para. 47. 47 C.F.R. §64.1601.

[4] CPUC's order requires that customers have their choice of either 1) per call blocking using *67 to enable the blocking; 2) per line blocking; or 3) per line blocking with the ability to unblock using a code other than *67. California Public Utilities Commission Decision No. 92-06-065, released June 17, 1992, at 38. The decision was subsequently modified to permit the service to be offered with only the first two options while the third was being developed, Decision No. 92-11-062, Nov. 23, 1992 at 5.

[5] Pacific states that there is no way to treat interstate and intrastate calls differently for caller ID purposes. The passage of Calling Party Number (CPN) is independent of the jurisdictional nature of the call. If it passes CPN to interexchange carriers on interstate calls, Pacific claims that it cannot prevent its passage on intrastate calls. Nor is there any way to offer different blocking options on an interstate basis, according to Pacific. Since the blocking code is entered prior to the called number being dialed by the calling party, the network would need the capability to suspend the call while accessing a database to determine both the jurisdictional nature of the call and whether the blocking code invoked could be honored on the call. Pacific Pet. at 3.

5. Ad Hoc Telecommunications Users Committee opposes Pacific's petition on the grounds that 1) there has been no change in conditions since the original waiver was granted, 2) any stay request is premature because Pacific is not required to tariff caller ID services at the federal or state level until April 1995, 3) the Commission should consider preempting state regulation of caller ID services rather than granting an indefinite waiver to Pacific, and 4) Pacific has failed to meet the threshold requirements for obtaining a stay.

6. Pacific responds that it will answer California's contentions regarding the practicality of implementing different blocking standards in its pleadings in the caller ID proceeding. Meanwhile, it notes that California supports its waiver, that AT&T and Nextel do not oppose a waiver until the FCC resolves the *Caller ID Order* reconsideration, and that MCI supports a waiver until ninety days beyond the release of such an order. Pacific answers Ad Hoc's assertions by noting that it is not seeking a stay of the *Caller ID Order*, but rather an extension of a waiver it was granted in the *Pacific Structural Separation Order*, absent which it would be required to tariff caller ID services immediately.

7. We granted Pacific a temporary waiver from its obligation to tariff federal and state caller ID services because issues related to the apparent incompatibility of federal and California state privacy requirements had not been resolved. We were persuaded that, until such matters were resolved, we could not determine the technological and economic practicality of Pacific's provision of an interstate caller ID offering. Thus, we found good cause to grant Pacific a waiver until the Commission could resolve the apparent incompatibility. Pacific now points out that the *Caller ID Order* has not resolved that issue. Rather the matter remains at issue in the reconsideration proceedings. Thus, the same rationale that justified the initial waiver supports an extension of the waiver until 90 days after a Commission decision on reconsideration of the *Caller ID Order*. None of the five commenters offers any good reason why we should not grant such a temporary extension. While Pacific asks for an indefinite waiver, we see no need to consider the grounds for an indefinite waiver until the Commission has reached a decision in the *Caller ID Order* reconsideration. Therefore, we grant Pacific an extension of its initial waiver of tariffing requirements for certain interstate and intrastate caller ID services until 90 days after a Commission decision on reconsideration of the *Caller ID Order*.

8. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 & 0.291, a waiver for Pacific Bell of the initial federal tariffing requirements for certain interstate and intrastate caller ID services IS GRANTED to the extent provided therein, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning
Division, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone Company Of SouthCentral Kansas, Inc. AAD 94-33

and

South Central Telephone Association, Inc.

and

South Central Telecommunications Of Kiowa, Inc.

Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules, and of Sections 61.41 and 69.3(e) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1994; Released: June 30, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On March 25, 1994, United Telephone Company of SouthCentral Kansas, Inc. ("United"), South Central Telephone Association, Inc. ("SCTA"), and South Central Telecommunications of Kiowa, Inc. ("South Central"), which is a wholly owned subsidiary of SCTA, filed a Joint Petition for Waiver of the Definition of "Study Area" contained in the Appendix-Glossary of Part 36 of the Commission's Rules to consummate the proposed sale of one United exchange in Kansas to South Central.[1] The parties also request waiver of the Commission's price cap rules, 47 C.F.R. § 61 *et seq.*, to allow the purchasing carrier to continue to be regulated on a cost basis rather than under price caps. We placed this petition on public notice on April 19.[2] We received comments in support of the request from one party, the United States Telephone Association. On June 17, 1994, SCTA submitted a copy of the Order of the Kansas State Corporation Commission ("Kansas SCC"),[3] which approved the transaction.

2. SCTA's wholly owned subsidiary South Central was incorporated in Kansas on January 10, 1994. South Central currently operates no telephone exchanges in Kansas. SCTA presently operates two study areas. SCTA operates six telephone exchanges in its rural Kansas study area and operates two telephone exchanges in its rural Oklahoma study area. The exchange being sold by United is located in Kiowa, Kansas. It serves approximately 744 access lines. The exchange is situated directly west of SCTA's existing Hazleton, Kansas exchange. South Central plans to replace Kiowa's outmoded step-by-step switches, to upgrade existing service. The parties request authorization to delete the Kiowa exchange from United's existing Kansas study area, and to add it to the SCTA's existing Kansas study area (which will be a combined SCTA/South Central study area for jurisdictional separations purposes).

I. STUDY AREA WAIVER

3. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform their jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[4] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[5] The Commission has three primary concerns in considering study area boundary change petitions: first, that the change not adversely affect the Universal Service Fund ("USF") support program;[6] second, that the state commission(s) having regulatory authority have no objection to the change;[7] and finally, that there is strong public interest support for a waiver.

Petition

4. The proposed transaction involves one exchange in Kansas, serving approximately 744 access lines. The Kiowa exchange is a low-cost exchange. Its average cost per loop is $206, well below the national average. United presently receives no USF support attributable to the Kiowa ex-

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[1] United Telephone Company of SouthCentral Kansas, Inc., South Central Telephone Association, Inc., and South Central Telecommunications of Kiowa, Inc. filed a Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules, and Sections 61.41 and 69.3(e) of the Commissions Rules. ("Joint Petition")

[2] Public Notice, DA 94-299, released April 19, 1994.

[3] Kansas State Corporation Commission *Order and Certificate*, Docket Nos. 190,109-U 94-USCT-387-CCS and 190,110-U 94-SCKT-388-COC. ("Kansas SCC Order")

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (January 8, 1985) (*1985 Order Adopting Recommendation*).

[5] 47 C.F.R. Part 36, Appendix-Glossary.

[6] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[7] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes.

change.[8] United has a cost per loop of $467 and receives approximately $7 million in USF support for its Kansas study area.[9] However, removal of the Kiowa exchange from United's Kansas study area will increase its study area cost per loop from $467 to $472, and increase its USF support by approximately $48,000.[10] SCTA's existing six telephone exchanges in Kansas have 1,044 access lines, an average cost per loop of $384, and receives approximately $80,000 in USF support.[11] Addition of the Kiowa exchange to the SCTA/South Central Kansas study area will reduce this study area's cost per loop to $289, and will reduce SCTA/South Central's USF support by approximately $643,000.[12] The petitioners contend that the overall, proposed transaction will result in a *net decrease* of approximately $16,000 in USF support received by the affected United and SCTA/South Central study areas.[13]

5. South Central proposed to purchase the Kiowa exchange and then include the exchange within SCTA's existing Kansas study area (which will be a combined SCTA/South Central) for jurisdictional separations purposes, including USF and DEM calculations.[14] Petitioners argue that the proposed transaction will produce numerous and significant public interest benefits for the present and future customers of the Kiowa exchange.[15] Petitioners state that South Central will upgrade the Kiowa central office by installing state-of-the-art digital switching facilities within 18 months after the proposed transaction is complete. This switching upgrade will enable South Central to offer Kiowa area residents and businesses new custom calling features, equal access to interLATA long distance carriers, improved facsimile and data transmission, and Signalling System 7 capabilities.[16] Also, petitioners state that SCTA plans to construct this year a 200-mile, inter-office fiber optic ring connecting its existing six Kansas and two Oklahoma exchanges, and soon after South Central will connect the Kiowa central office to that fiber optic ring.[17] Petitioners state that whereas United operates numerous exchanges throughout the state of Kansas, the Kiowa exchange is somewhat isolated from other United exchanges. SCTA/South Central, however, is a local entity serving the very southcentral Kansas and northcentral Oklahoma region where Kiowa is located.[18] Petitioners state that acquisition of the Kiowa exchange will permit SCTA and South Central to realize significant technical and administrative efficiencies benefiting the subscribers of both companies.

Discussion

6. We have analyzed this transaction and find that granting this waiver will not have an adverse affect on the USF. SCTA estimates that the SCTA/South Central study area will receive approximately $80,000 in USF support during 1994.[19] As a consolidated study area, the estimated 1994 total would be approximately $16,000. As a consequence, SCTA/South Central's USF support payments would be reduced by $64,000 if these estimates by SCTA are correct. United estimates that in 1994 its United study area will receive an increase in USF support of approximately $48,000[20] after the sale of its Kiowa exchange. Thus, the parties claim that grant of this waiver will result in a net reduction in the USF of $16,000.[21] Our independent analysis leads us to conclude that the effects of South Central purchasing the Kiowa exchange and consolidating it within the SCTA study area will not have an adverse effect on the USF.

7. In addition, our concerns regarding future USF effects have been mitigated by the Commission's adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years. The Joint Board recommended, and the Commission adopted interim rules that will limit the growth of the USF to the rate of growth in the total number of working loops nationwide.[22] That rate has ranged from 2 percent to 3.5 percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive USF growth. The Joint Board has also expressed its intention to evaluate the USF as it currently exists, and reform it to reflect changes in the industry and in technology; pending completion of that proceeding, however, the interim rule adopted by the Commission will remain in effect.[23] These actions should also contain any adverse effects on the USF that the proposed study area waiver might cause that have not otherwise been identified.

8. We conclude, based upon the record before us as a whole, that the petitioners have made the necessary showings that granting the requested waiver petition would be in the public interest and would not adversely affect the USF. The petitioners present a strong case that the acquisition of the Kiowa exchange would permit SCTA and South Central to realize significant technical and administrative efficiencies benefiting the subscribers of both companies. In addition, because the Kansas SCC has approved the transaction as being in the public interest,[24] we conclude that the petition should be granted.

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[8] USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average cost per loop in order to qualify for USF support. The national average cost per loop is currently $240, so the threshold for USF support is $276.

[9] Joint Petition at Attachment A.

[10] *Id.* at 8.

[11] *Id.* at Attachment B.

[12] *Id.* at 9.

[13] *Id.* at 8.

[14] *Id.* at 12.

[15] *Id.* at 6.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 7.

[19] Joint Petition at Attachment B.

[20] United estimates that before the sale of its Kiowa exchange it would receive approximately $6,585,644 in USF support. After the sale of its Kiowa exchange United estimates that it will receive approximate $6,633,789 in USF support. An increase in USF support of $48,145.

[21] SCTA's reduction in USF will be $63,303; United's increase in USF will be $48,145. The net reduction on the USF will be $15,158.

[22] Recommended Decision, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993).

[23] Report and Order, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 303 (1993).

[24] Kansas SCC Order at 3.

II. PRICE CAPS WAIVER

9. The joint petition also request waiver of Section 61.41 of the Commission's rules, the price caps "all or nothing" rule. SCTA and South Central seek waiver of this rule to allow its continued participation in the NECA pools following acquisition of the Kiowa exchange from United.

10. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[25] Under this rule, SCTA and South Central's acquisition of the United exchange obligates them to exit the NECA pools and become subject to price cap regulation. They request waiver of this rule because the rule's application here would be contrary to the public interest and the purpose of price cap regulation would not be served. They state that they are committed to upgrading the quality of local exchange service in Kansas by installing digital central offices within 18 months. They argue that they are participating in the NECA pools as small companies, and that continued participation in the pools is essential to their economic viability and to the maintenance of telephone service for their customer base. South Central also request waiver of the concomitant effects of Section 69.3.[26] SCTA and South Central state that there is no relationship among the parties to the proposed sale that would allow any of these companies to shift costs as a consequence of the sale.

11. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[27] The rationale for this rule is explained in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[28] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of "gaming the system." Such cases might justify narrow waiver of the all or nothing rule."[29]

12. There is good cause to grant SCTA and South Central a waiver of the all or nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- does not apply to SCTA or South Central. Neither SCTA nor South Central seek to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a company to "game the system" is also not a source of concern. Except for the exchange that it has sold to South Central, United remains regulated under price caps.

13. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[30] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers smaller than the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the "all or nothing" rule should take into account the companies' preferences, particularly for small carriers.

14. We therefore grant a waiver of the "all or nothing" rule to SCTA and South Central. For the present, SCTA and South Central will continue to be regulated under rate of return. Because we are waiving Section 61.41, SCTA nor South Central need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, SCTA and South Central are free to elect price cap regulation in the future, provided they withdraw from the NECA pools.

III. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the Joint Petition of United Telephone Company of SouthCentral Kansas, Inc., South Central Telephone Association, Inc., and South Central Telecommunications of Kiowa, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent set forth above.

16. IT IS FURTHER ORDERED that the Petition of South Central Telephone Association, Inc. and South Central Telecommunications of Kiowa, Inc. for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c), IS GRANTED.

17. IT IS FURTHER ORDERED that the Petition of and South Central Telecommunications of Kiowa, Inc. for waiver of Section 69.3(e) of the Commission's Rules, 47 C.F.R. § 69.3(e), IS DISMISSED.

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[25] 47 C.F.R. § 61.41(c)(2).

[26] Section 69.3(e) states that "any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...." 47 C.F.R. § 69.3(e).

[27] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order), modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[28] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2637, 2706.

[29] *Id.* at note 207.

[30] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEL-SAVE, INC.,	File Nos. E-93-096
Complainant,	E-94-032
	E-94-037
	E-94-038
v.	E-94-048

AMERICAN
TELEPHONE AND
TELEGRAPH COMPANY
Defendants.

ORDER

Adopted: June 30, 1994; Released: July 8, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. Tel-Save, Inc. (Tel-Save) filed the above-captioned formal complaints against American Telephone and Telegraph Company (AT&T) alleging violations of Sections 201, 202 and 203 of the Communications Act, 47 U.S.C. §§ 201-203 in connection with various contract tariff offerings. AT&T denied the allegations and moved to dismiss the complaints. The parties subsequently entered into negotiations aimed at resolving the complaints. On June 27, 1994 the parties filed a joint motion to dismiss the complaints with prejudice stating that a mutually agreeable settlement had been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS, INC.,
LDDS COMMUNICATIONS, INC. d/b/a
LDDSMETROMEDIA COMMUNICATIONS,
SCHNEIDER COMMUNICATIONS, INC.,
TELEDIAL AMERICA, INC.
Complainants,

v.

AMERITECH TELEPHONE OPERATING COMPANIES,
Defendants.

File No. E-93-122

ORDER

Adopted: June 28, 1994; Released: July 8, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 24, 1993, LDDS Communications, Inc. d/b/a LDDSMetromedia Communications (LDDS), along with several other complainants, filed the above-captioned complaint against the Ameritech Telephone Operating Companies (Ameritech)[1] seeking damages resulting from Ameritech's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On June 17, 1994, however, LDDS filed a motion requesting that it be dismissed from the complaint. In support of its motion, LDDS states that it has settled with Ameritech.

2. We are satisfied that granting LDDS's motion for partial dismissal will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the LDDS Communications, Inc. Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims and requests for relief of LDDS Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] The Ameritech Telephone Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Instron Corporation,
Complainant,

v.

American Telephone and Telegraph Company and — File No. E-94-023

Pacific Bell,
Defendants. — File No. E-94-024

ORDER

Adopted: June 30, 1994; Released: July 8, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 24, 1993, Instron Corporation (Instron) filed formal complaints against American Telephone and Telegraph Company (AT&T) and Pacific Bell alleging violations of Sections 201, 202 and 203 of the Communications Act of 1934, as amended (the Act)[1] AT&T and Pacific Bell denied the allegations and moved to dismiss the complaints. Subsequently, the parties entered into negotiations aimed at resolving the complaints.[2] In a letter dated June 2, 1994, counsel for Instron requested that the complaints be dismissed with prejudice.

2. We are satisfied that granting Instron's request to dismiss the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Instron's request to dismiss complaints, dated June 2, 1994, IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint proceedings ARE DISMISSED WITH PREJUDICE and ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] 47 U.S.C. §§ 201, 202, 203.
[2] In March 1994, the parties voluntarily submitted their disputes for mediation in the Commission's Alternative Dispute Resolution (ADR) program.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COFFEE COUNTY BOARD OF EDUCATION
Society Hill, Alabama — File No. BPLIF-920320DN

LOWNDES COUNTY PUBLIC SCHOOLS
Montgomery, Alabama — File No. BPLIF-920520DA

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: July 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Coffee County Board of Education (Coffee) and Lowndes County Public Schools (Lowndes), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Society Hill and Montgomery, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Lowndes is accredited by the Alabama State Department of Education and is applying to provide ITFS service to students at schools within its jurisdiction. Since Coffee County is located approximately 40 miles from Society Hill and other parts of Macon County, the area Coffee proposes to serve, the applicant has submitted the requisite letters of intended use from accredited schools that will use its service and has documented the establishment of local programming committees.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant in predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Lowndes is entitled to four points for being a school district serving the formal educational needs of schools within its jurisdiction. Coffee, based in New Brockton, Alabama, seeks to serve the Macon County area. Because it does not have jurisdiction within the area it proposes to serve, Coffee is not entitled to points for being a local applicant.

Accreditation. Lowndes is entitled to three points because it is accredited by the Alabama State Department of Education. Although Coffee proposes to serve accredited institutions, a factor which satisfies its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, Coffee is not entitled

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

to any points by this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986); and *Unified School District #511*, 8 FCC Rcd 7060, 7061 (1993).

Four-Channel Limitation. Neither applicant is the current licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Lowndes' illustrative schedule and program grid both propose an average of 21 hours of formal ITFS programming and zero hours of other ITFS programming per channel per week. Thus, Lowndes is entitled to one programming merit point. Coffee's illustrative schedule and its program grid both propose an average of 24.375 hours of formal ITFS programming and zero hours of other ITFS programming per channel per week. Thus, Coffee is also entitled to one programming merit point.

E- and F-Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Lowndes is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Coffee is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of three points. Thus, the tentative selectee is Lowndes.

OTHER MATTERS

5. Lowndes proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Capital Cable Television, Inc. (CCTV), two of whose provisions do not comply with the Commission's requirements for such leases. First, the lease provides for an initial term of two years from the date CCTV "receives notice from [Lowndes] that [Lowndes] has notified the FCC of the completion of construction of [its] station," with four automatic renewal terms of two years each. This provision is inconsistent with the Commission's maximum term for excess capacity leases because it extends beyond the term of the license. *Instructional Television Fixed Service - Report and Order in Gen. Docket Nos. 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Second, the lease does not include a provision which would afford the licensee an opportunity to purchase or lease the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1987). Accordingly, Lowndes' authorization will be conditioned upon conformity of the lease to Commission requirements.

6. No petitions to deny or informal objections have been filed against Lowndes' application, and we find Lowndes fully qualified to be an ITFS licensee. We also conclude that grant of Lowndes' application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Coffee County Board of Education (BPLIF-920320DN) IS DENIED, and the application of Lowndes County Public Schools (BPLIF-920520DA) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Lowndes submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-296

In the Matter of

Simplification of the
Depreciation Prescription
Process

SECOND REPORT AND ORDER

Adopted: June 22, 1994; Released: June 28, 1994

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On September 23, 1993, we adopted streamlined depreciation prescription procedures for the local exchange carriers ("LECs") regulated under our price cap incentive regulatory plan.[1] These procedures require us to establish ranges for the underlying factors that are used to compute depreciation rates for plant categories.[2] The new procedures generally will permit carriers to make streamlined filings for changes in depreciation rates for these categories, as long as their underlying factors fall within the prescribed ranges. By adopting these streamlined procedures, we hoped to simplify the depreciation process, achieve administrative savings, and allow the LECs greater flexibility[3] in the depreciation process, while remaining consistent with the public interest.[4]

2. We further concluded that the streamlined procedures should be implemented as soon as practicable. To that end, we decided to implement the new procedures in two phases. In phase one, we directed the Common Carrier Bureau to identify the accounts most readily adaptable to the range approach and propose ranges for them.[5] In phase two, we will establish ranges for the remaining, more complex accounts, to the extent feasible.

3. On November 8, 1993, we adopted an *Order Inviting Comment*[6] on 22 plant categories selected by the Bureau for initial implementation of the streamlined procedures. These categories represent two-thirds of the 33 plant categories for which carriers currently submit depreciation studies. In addition, the *OIC* sought comments on the proposed projection life and future net salvage ranges proposed by the Bureau for these categories.

4. A total of 26 parties filed comments, reply comments, and *ex parte* communications.[7] These parties include state commissions, the National Association of Regulatory Utility Commissioners ("NARUC"), LECs, the United States TelephoneAssociation ("USTA"), MCI Telecommunications Corporation ("MCI"), the California Cable Television Association, and the General Services Administration ("GSA"). In this *Second Report and Order,* we are adopting the proposed ranges.[8]

II. DISCUSSION

A. Accounts Selected for the Streamlined Procedures

5. The *OIC* solicited comments on the 22 plant categories selected for phase one of the implementation process.

1. Position of the Parties

6. The LECs and USTA maintain that, to maximize the benefits of the simplification procedures, ranges should be established for all accounts as quickly as possible. They argue that the limited number of accounts for which ranges have been proposed in phase one severely restricts the benefits of streamlining depreciation.[9] According to the

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[1] Simplification of the Depreciation Prescription Process, *Report and Order,* 8 FCC Rcd 8025 (1993) (*Depreciation Simplification Order*).

[2] Rates are determined by a depreciation rate formula:

$$\text{Depreciation Rate} = \frac{100\% - \text{accumulated depreciation \%} - \text{future net salvage\%}}{\text{average remaining life}}$$

This formula requires forecasting two parameters: future net salvage (FNS) and average remaining life (ARL). The FNS is the estimated gross salvage of the plant less any estimated cost of removal. The ARL is the estimated average of the future life expectancy of investment in a particular plant account. The ARL is derived from two basic factors: a projection life and a survivor curve. The projection life is the life expectancy of new additions to plant.

[3] Flexibility allows a LEC to select, within established ranges, the life and salvage factors it uses in prescribed depreciation rates without undergoing the expense of submitting studies to justify its specification of those factors. *Depreciation Simplification Order,* 8 FCC Rcd at 8035. In addition, under the new procedures, the LECs can change their basic factors annually, as opposed to the current triennial represcription cycle. *Id.* at 8054.

[4] *Id.* at 8054.

[5] *Id.* at 8051.

[6] Simplification of the Depreciation Prescription Process, *Order Inviting Comments (OIC),* CC Docket No. 92-296, FCC 93-492 (Nov. 12, 1993).

[7] The list of the parties filing each type of pleading is contained in Appendix A.

[8] In the *Depreciation Simplification Order,* we addressed such issues as the accounts for which ranges should be established, the data and procedures to be used to establish, review and update the ranges, and eligibility criteria for using the ranges. Many of the parties filing in response to our *OIC* included additional comments on these issues. Such comments are not relevant to the questions raised by the *OIC.* To the extent these comments were also made by these parties in their petitions for reconsideration of the *Depreciation Simplification Order,* they will be considered in conjunction with our analysis of the petitions seeking modifications to that *Order.* In the paragraphs below, we address the issues germane to our *OIC.* (

[9] *See, e.g.,* Bell Atlantic Comments at 1-2; SNET Comments at 1-2; Pacific Comments at 2; US West Comments at 2.

majority of these commenters, the 22 categories selected for this phase contain only a small portion of the carriers' overall plant investment, and do not include the central office and outside plant accounts that contain most of the plant investment and are most affected by competition and changing technologies. These commenters suggest that phase one of the implementation process should be expanded to include ranges for the larger network-related accounts.[10] Moreover, GTE, Southwestern, and US West[11] contend that the Commission has sufficient information to establish ranges for these larger accounts at this time.

7. MCI, the Oklahoma Commission, the Utah Commission, the Colorado Commission, the Minnesota Department of Public Service ("Minnesota DPS"), and NARUC support the 22 plant categories proposed in the *OIC* for implementation in phase one of the simplification process. The Oklahoma and Utah Commissions[12] state that the categories selected in the *OIC* are generally uncontroversial and, therefore, ranges can be established readily for them. The Colorado Commission, the Minnesota DPS, and NARUC[13] contend that the excluded plant categories present a variety of circumstances requiring further study before proper ranges can be established.

8. The Missouri Commission opposes the range approach on the grounds that it does not consider the individual circumstances of the LECs. It states that, if adopted, the range approach should be limited to individual accounts with no more than two percent of total depreciable plant investment.[14]

2. Discussion

9. We agree with the commenters that the ranges should be established as soon as possible. However, to begin the simplification process in 1994, it is necessary to implement the streamlined depreciation procedures in two phases and to limit the initial phase to certain categories of plant readily adaptable to the range approach. As we stated in the *Depreciation Simplification Order*, this schedule will make the most efficient use of our limited resources.[15] To change our plans at this time and to perform the thorough analyses required to establish appropriate ranges for additional plant accounts would delay unnecessarily the use of the new procedures for the depreciation categories identified in the *OIC*. The commenting parties have presented no new information or arguments that would warrant a change in our plans.

10. Prior to the release of the *Notice of Proposed Rulemaking* in this proceeding, the staff of the Common Carrier Bureau had been considering ways to improve and to streamline the depreciation prescription process. The staff collected a substantial amount of data and performed analyses to determine the difficulty of establishing ranges for various accounts. Based on these analyses, it concluded that the 22 plant categories proposed in the *OIC* were the categories most adaptable to the range approach, because their life and salvage factors did not vary substantially among the carriers, or over time. As noted above, the commenting state commissions generally concur with this conclusion.

11. The LECs complain that we did not propose to include additional accounts, especially the larger network-related accounts, in phase one of the simplification process. They contend that, until ranges are established for these accounts, the benefits derived from the simplification process will be minimal. We disagree. We estimate that the establishment of the ranges for the 22 categories selected for phase one will result in a substantial simplification and resource savings. Carriers now file depreciation studies that average approximately 660 pages, which amounts to an average of 20 pages of analysis per plant category for each of 33 categories. Our new streamlined procedures will reduce the analysis required for each category to a maximum of 5 pages, which is a savings of 15 pages per category. Thus, instituting these procedures for the 22 categories selected for phase one will reduce the size of a typical depreciation study by a total of 330 pages, or 50%. We recognize that a 50% reduction in the size of the study will not necessarily result in a reduction of the workload by 50%. Nevertheless, in our view, the elimination of so much of the detailed analyses currently required in the studies will produce a substantial administrative savings for both the LECs and our staff.

12. Moreover, we plan to propose ranges for additional accounts later this year, and to adopt ranges for these accounts early in 1995. As a result, we expect that the simplification procedures will be in place for all accounts, to the extent feasible, for the 1995 depreciation prescription review process. The ranges we establish in this *Second Report and Order* will be used to establish depreciation rates for 1994. Considering that ranges for additional accounts will take effect in 1995, we believe that our two-phase plan will allow us to achieve a major improvement in the depreciation prescription process in a very short period of time.

13. Accordingly, we find that the selection of accounts listed in Appendix B of this *Second Report and Order* for phase one of the simplification process is reasonable, and will further our objective of implementing the simplification procedures as quickly as possible. We conclude that it is in the public interest to adopt ranges for these accounts at this time. We further find that the record in this proceeding is not adequate to support adoption of ranges for any other accounts at this time.

B. Establishment of Ranges at the Category Level

14. In the *OIC*, we proposed to establish ranges at the account level for sixteen plant accounts and at a rate category level for four additional accounts.[16]

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[10] *See, e.g.*, Ameritech Comments at 2; BellSouth Comments at 3; NYNEX Comments at 2-3; Southwestern Comments at 2-3; US West Comments at 2.

[11] GTE Comments at 3; Southwestern Comments at 3; US West Comments at 4-6.

[12] Oklahoma Commission Comments at 2-3; Utah Commission Comments at 2.

[13] Colorado Commission Reply Comments at 5-6; Minnesota DPS Reply Comments at 5; NARUC Comments at 5.

[14] Missouri Commission Comments at 1-2.

[15] *Depreciation Simplification Order*, 8 FCC Rcd at 8051.

[16] A rate category is a category of plant to which a specific depreciation rate is applied. For the majority of plant, the rate categories correspond to the plant accounts prescribed in Part 32. (47 C.F.R. Part 32). For example, the rate category for poles is Account 2411, Poles. (47 C.F.R. §32.2411). For six plant

1. Position of the Parties

15. The majority of parties commenting on this matter support our proposal. NARUC states that complying with streamlined study requirements at the rate category level would not be difficult or expensive for the LECs, because the Commission's accounting rules already require carriers to maintain the necessary subsidiary records.[17] GTE, however, contends that this policy would result in additional work for the carriers.[18]

16. Pacific suggests that if a carrier maintains levels of categorization that are more detailed than those proposed by the Commission, it should be allowed to use the streamlined procedures.[19] Specifically, it recommends that, if the "composite" factors of a carrier's individual rate categories are within the ranges established for the category as a whole, the carrier should be able to use the streamlined procedures. NYNEX makes a special request that the Commission establish a separate rate category[20] with appropriate ranges for interoffice cable plant, because it contends the life characteristics of this plant are significantly different from those of subscriber cables.

2. Discussion

17. Based on these comments, we have decided to adopt the ranges for the 22 rate categories as proposed in the *OIC* (see Appendix B). As NARUC observed, establishing ranges at these levels should not require any additional record keeping or substantial effort on the part of the LECs, since they are presently required to maintain their accounting records at these levels under Part 32.[21] This requirement includes maintaining records at the category levels listed in Appendix B for Account 2232, Circuit Equipment;[22] Account 2421, Aerial Cable;[23] Account 2422, Underground Cable;[24] and Account 2423, Buried Cable.[25]

18. We have decided not to develop special ranges for LECs that have chosen to study rate categories at levels not listed in Appendix B. The application of our range approach is based on national averages of prescribed depreciation factors. Consequently, to develop special ranges would slow the process significantly as it would be necessary to require many carriers to submit large amounts of data which we would then have to analyze in order to establish appropriate ranges. This would place an undue burden on the majority of the carriers that do not study the plant investment at the levels of detail desired by the LECs that seek ranges for additional categories. This is not to say that a LEC cannot disaggregate the categories for which we prescribe ranges into subcategories, if it concludes that further disaggregation is necessary to compute accurate depreciation rates. We believe that it would be too burdensome, however, and an inefficient use of resources to develop ranges for these special cases.

19. Nevertheless, we will consider requests from LECs like Pacific, that study an account listed in Appendix B at a more detailed level than shown, but wish to qualify within the established range for that account. During the prescription process, we will consider their proposals on a case-by-case basis to use the basic factors computed at the more detailed levels to satisfy the range requirements. In appropriate cases, this should relieve some of the burden on LECs studying rate categories at more detailed levels, yet allow us to administer our range approach on a uniform basis.

C. Ranges Adopted for the Initial Accounts

20. The *OIC* solicited comments on a specific set of proposed ranges for the future net salvage and projection life factors for 22 plant categories.

1. Position of Parties

21. USTA and the LECs argue that the proposed ranges are too narrow,[26] because the LECs will be able to use the streamlined procedures for fewer than 50% of the 22 plant categories. They argue that the ranges should be expanded in order to streamline the process significantly. In addition, for a few of the plant categories, they argue that the proposed life ranges are too high. They suggest that, because of the rapid changes in technology, certain plant accounts should be written off more quickly.[27]

22. GSA, MCI, NARUC and most of the state commission commenters[28] support the ranges proposed in the *OIC*. California CATV and GSA believe that the objections to the proposed ranges raised by the LECs are aimed at obtaining higher depreciation rates, rather than streamlining the depreciation process.[29]

23. On the other hand, the Missouri Commission believes that the proposed ranges are too wide, and would permit the LECs to increase significantly their depreciation expenses without adequate justification. It suggests more narrow life ranges in which the upper bound would exceed the lower bound by no more than 20%.[30] Moreover, the Missouri Commission recommends that we increase the upper and lower life bounds for fiber cable and public telephones and increase the upper and lower net salvage bounds for fiber cable.[31]

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accounts, however, we allow carriers to subdivide the accounts so that separate depreciation rates apply to different types of investment within a particular account. *See* 47 C.F.R. §§ 32.2232, 32.2421, 32.2422, 32.2423, 32.2424, 32.2426. For example, in the cable accounts, we generally prescribe different rates for metallic (copper) cable verses non-metallic (fiber) cable.

17 NARUC Comments at 5.

18 GTE Comments at 3-4.

19 Pacific Comments at 6-7.

20 NYNEX Comments at 3.

21 47 C.F.R. §32.12(b). The LECs for which we prescribe depreciation rates are Class A companies and must keep all the Class A accounts prescribed in Part 32.

22 47 C.F.R. §32.2232(c).

23 47 C.F.R. §32.2421(a).

24 47 C.F.R. §32.2421(a).

25 47 C.F.R. §32.2423(a).

26 *See, e.g.*, Ameritech Comments at 3-4; NYNEX Comments at 4; and BellSouth Comments at 3-4.

27 Bell Atlantic Comments at 5-8; US West Comments at 9-16.

28 GSA Comments at 7; MCI Comments at 2; NARUC Comments at 4; Utah Commission Comments at 1; Oklahoma Commission Comments at 3-4; Colorado Commission Reply Comments at 1; Minnesota DPS Reply Comments at 6.

29 California CATV Reply Comments at 5; GSA Reply Comments at 7.

30 Missouri Commission Comments at 2-3.

31 *Id.* at 5.

2. Discussion

24. In the *Depreciation Simplification Order,* we set forth the specific data that should be considered in establishing the projection life and future net salvage ranges,[32] and we used these data in proposing ranges in the *OIC*. We first developed ranges of one standard deviation around the means of the basic factors underlying the currently prescribed LEC depreciation rates. From that point, we determined whether there were technological trends or changing carrier plans that might not be fully reflected in some of the LECs' prescribed factors. We then considered the number of LECs with basic factors that fall within the initial ranges and altered the ranges where appropriate.[33]

25. We do not believe that the ranges are too high, or too low, as some of the commenters contend. Our objective was not to change the depreciation rates, but to streamline the process used by the Commission to prescribe those rates. As indicated above, we based the ranges on statistical studies of the most recently prescribed factors. These statistical studies required detailed carrier-by-carrier analyses of the most recent plant retirement patterns, the carriers' plans, and the current technological developments and trends. Because the proposed ranges reflect these data, we believe that the ranges provide a reasonable degree of confidence that the basic factors falling within their bounds will produce depreciation rates accurately reflecting plant retirements, company plans, and technological trends. Moreover, they allow the LECs sufficient flexibility in the selection of the final factors.[34] We do not have the same confidence with regard to wider ranges. Consequently, we will not at this time modify any of the proposed ranges. We believe that some experience with the ranges should be developed before we consider modifying them. If changing conditions require revisions in the ranges, we can modify them at that time.[35]

26. The LECs' assertion that they will be able to use the streamlined procedures for fewer than 50% of the 22 rate categories is incorrect.[36] We have studied the potential application of the ranges to every carrier for which the Commission prescribes depreciation rates. We have found that today over two-thirds of the carriers would qualify for the streamlined procedures for the 22 proposed rate categories. Furthermore, our most recent depreciation rate reviews indicate that the proportion should increase over the next few years.

D. Other Issues

1. Previous Study Options

27. In the past, we allowed two informal, alternative streamlined procedures for plant accounts representing less than 3% of a carrier's total depreciable investment in a jurisdiction. One informal procedure allowed carriers to set projection lives at the average of the most recent life indications and to set their future net salvage percentages at the average of the most recent five-year band of actual net salvage percentages.[37] The second informal procedure allowed the carriers to use the currently prescribed projection life and future net salvage factors.[38] Ameritech and Pacific Bell ask whether we intend to continue to allow price cap LECs to use these procedures.[39] In addition, Pacific suggests that the Commission should reinstate these streamlined study procedures, and focus its simplification efforts on other accounts, thus increasing the number of accounts subject to some type of simplification.[40]

28. We are replacing these informal streamlined study procedures with the adoption of our range option. To have several streamlined procedures in place at the same time could prove confusing and could negate any streamlining achieved by the Commission. Moreover, these previous procedures had a minimal streamlining effect as compared with the new streamlined procedures. To illustrate, they only reduce the studies by 3 or 4 pages per category, whereas our new procedures reduce them by 15 pages. Therefore, we have decided to employ only the streamline range option adopted in our *Depreciation Simplification Order*.

2. Carriers Scheduled for Review in 1995 and 1996.

29. Under our depreciation prescription process, one-third of the carriers for which we prescribe depreciation rates have their rates reviewed each year. In the *Depreciation Simplification Order,* we stated that price cap LECs scheduled for review in 1995 and 1996 could file for changes in their depreciation rates for 1994 as long as they used basic factors within the ranges we selected. These carriers must file these depreciation rate changes in a timely manner in accordance with the requirements set forth in the *Depreciation Simplification Order*.[41]

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[32] *Depreciation Simplification Order,* 8 FCC Rcd at 8050.

[33] For example, for the circuit analog category (Account 2232), a life range of plus or minus one standard deviation (SD) about the mean would yield a 8.5 - 11 year life range, with 67% of the carriers falling within the range. Our decision to expand the range to 8 - 11 years resulted in 76% of the carriers falling within the range. Likewise, a salvage range of plus or minus one SD about the mean would yield a -4% to -1% salvage range for this category, with 60% of the carriers falling within the range. By widening the range to -5% to 0%, 98% of the carriers would then fit within the range.

[34] *See supra,* note 3.

[35] *Depreciation Simplification Order,* 8 FCC Rcd at 8058.

[36] In the *Depreciation Simplification Order,* the Commission decided that "if a LEC's current basic factors for any one account do not both fall within the established ranges for that account, the LEC may not use the range approach for that account." *Depreciation Simplification Order,* 8 FCC Rcd at 8055.

[37] Carriers could use this procedure in cases where suitable mortality data existed and wide fluctuations in indications did not occur.

[38] Carriers could use this procedure only if there were no suitable mortality data or if mortality analysis provided inconsistent or unreliable results.

[39] Ameritech Comments at 3; US West Comments at 14.

[40] Pacific Comments at 3.

[41] *Depreciation Simplification Order,* 8 FCC Rcd at 8056.

III. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 201-205 and 220(b), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201-205 and 220(b), that the ranges for the future net salvage and the projection life factors for the accounts listed in Appendix B are HEREBY ADOPTED as specified in Appendix B.

31. IT IS FURTHER ORDERED, that this order is effective thirty days after publication in the Federal Register.

32. IT IS FURTHER ORDERED, that carriers may use the ranges established herein for federal filing purposes prior to the effective date of this order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Comments Filed

Ameritech Operating Companies (Ameritech)

Bell Atlantic (Bell Atlantic)

BellSouth Telecommunications, Inc. (BellSouth)

California Cable Television Association (California CATV)

Colorado Public Utilities Commission (Colorado Commission)

GTE Service Corporation (GTE)

General Services Administration (GSA)

MCI Telecommunications Corporation (MCI)

Missouri Public Service Commission (Missouri Commission)

National Association of Regulatory Utility Commissioners (NARUC)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

Oklahoma Corporation Commission Public Utility Division Staff (Oklahoma Commission)

Pacific Bell and Nevada Bell (Pacific)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (Southwestern)

United States Telephone Association (USTA)

Utah Division of Public Utilities (Utah Commission)

Reply Comments Filed

Bell Atlantic (Bell Atlantic)

BellSouth Telecommunications, Inc. (BellSouth)

California Cable Television Association (California CATV)

Colorado Public Utilities Commission (Colorado Commission)

General Services Administration (GSA)

MCI Telecommunications Corporation (MCI)

Minnesota Department of Public Service (Minnesota DPS)

National Association of Regulatory Utility Commissioners (NARUC)

Pacific Bell and Nevada Bell (Pacific)

Southwestern Bell Telephone Company (Southwestern)

United States Telephone Association (USTA)

Ex Parte Filing

United States Telephone Association (USTA)

APPENDIX B

ACCOUNTS AND RANGES FOR PHASE ONE IMPLEMENTATION

ACCOUNT NUMBER	ACCOUNT NAME	DEPRECIATION RATE CATEGORY	PROJECTION LIFE RANGE (YEARS)		FUTURE NET SALVAGE RANGE (PERCENT)	
			LOW	HIGH	LOW	HIGH
2112	Motor Vehicles	Motor Vehicles	7.5	9.5	10	20
2113	Aircraft	Aircraft	7	10	30	60
2114	Special Purpose Vehicles	Special Purpose Vehicles	12	18	0	10
2115	Garage Work Equipment	Garage Work Equipment	12	18	0	10
2116	Other Work Equipment	Other Work Equipment	12	18	0	10
2122	Furniture	Furniture	15	20	0	10
2123.1	Office Support Equip	Office Support Equip	10	15	0	10
2123.2	Co. Communications Equip	Co. Communications Equip	7	10	-5	10
2124	Gen. Purpose Computers	Gen. Purpose Computers	6	8	0	5
2231	Radio Systems	Radio Systems	9	15	-5	5
2232	Circuit Equipment	Digital Data Service	7	11	-5	10
2232	Circuit Equipment	Analog	8	11	-5	0
2311	Station Apparatus	Station Apparatus	5	8	-5	5
2341	Large PBX	Large PBX	5	8	-5	5
2351	Public Telephone	Public Telephone	7	10	0	10
2362	Other Terminal Equipment	Other Terminal Equipment	5	8	-5	5
2421	Aerial Cable	Non-Metallic	25	30	-25	-10
2422	Underground Cable	Non-Metallic	25	30	-20	-5
2422	Underground Cable	Metallic	25	30	-30	-5
2423	Buried Cable	Non-Metallic	25	30	-10	0
2424	Submarine Cable	Submarine Cable	25	30	-5	0
2441	Conduit Systems	Conduit Systems	50	60	-10	0

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Complaint of

CONSUMER SATELLITE SYSTEMS, INC.
d/b/a National Programming Service

v.

LIFETIME TELEVISION

CSR-4246-P

ORDER

Adopted: June 24, 1994; Released: June 27, 1994

By the Chief, Cable Services Bureau:

1. On March 21, 1994, Consumer Satellite Systems, Inc. d/b/a National Programming Service ("CSS") filed a Program Access Complaint (CSR-4246-P) against Lifetime Television ("Lifetime"), alleging that Lifetime violated Sections 628(b) and 628(c)(2)(B) of the Communications Act of 1934, as amended, by charging CSS excessive and discriminatory prices for Lifetime's programming service. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 §§ 19(b),(c)(2)(B)(1992), 47 U.S.C. §§ 548(b),(c)(2)(B).

2. On April 13, 1994, Lifetime filed a request for an extension of time in which to file its answer to the complaint because CSS and Lifetime were engaged in settlement negotiations. The extension request was granted orally by the Competition Division staff.

3. On May 10, 1994, CSS submitted a letter to the Commission requesting that the complaint be dismissed because Lifetime, on or about April 4, 1994, restructured its ownership and no longer is a vertically integrated programming vendor. The letter further states that the parties had resolved all issues involved in the complaint.

4. The prohibited conduct covered by Sections 628(b) and 628(c)(2)(B) of the Communications Act applies only to cable operators and satellite cable programming vendors in which a cable operator has an attributable interest. 47 U.S.C. §§ 548(b),h)(c)(2)(B). Non-vertically integrated programming vendors are not subject to these rules. *See* 47 C.F.R. §§ 76.1000 *et seq.*

5. The parties contend that, due to the restructuring of Lifetime's ownership on or about April 5, 1994, Lifetime is no longer vertically integrated and is thus no longer subject to the prohibitions of program access provisions of the Cable Act. With respect to allegations relating to Lifetime's pricing practices prior to April 5, 1994, we note that the parties have resolved all issues with respect to that period, and find that it is in the public interest to terminate this proceeding pursuant to the settlement by the parties.

6. Accordingly, IT IS ORDERED, that the Complaint of Consumer Satellite Systems, Inc. IS DISMISSED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-66

In the Matter of

Amendment of Section 73.202(b), RM-8469
Table of Allotments,
FM Broadcast Stations.
(Tyler, Texas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 23, 1994; Released: July 8, 1994

Comment Date: August 31, 1994
Reply Comment Date: September 18, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gleiser Communications, Inc. ("petitioner"), licensee of Station KDOK-FM, Channel 221A, Tyler, Texas, proposing the substitution of Channel 221C3 for Channel 221A at Tyler and modification of Station KDOK-FM's license to specify operation on the higher powered channel. In order to accomplish the upgrade at Tyler, petitioner also requests the substitution of Channel 256A for Channel 221A at Fairfield, Texas, and the modification of Station KNES-FM's license to specify the change in channel; and the substitution of Channel 277A for Channel 221A at Commerce, Texas, and the modification of Station KEMM-FM's license to reflect the channel change. Petitioner states it will apply for Channel 221C3 at Tyler and will also reimburse the licensees of Station KNES-FM and KEMM-FM for the reasonable expenses associated with the change in channels at Fairfield and Commerce.

2. In support of its proposal, petitioner states adoption of its proposal would permit Station KDOK-FM to increase its service area to 4,787.2 square miles which encompasses 192,911 persons. Petitioner advises that the channel substitutions for Station KNES FM and KEMM-FM will enable both stations to increase power of their respective stations to 6.0 kilowatts, resulting in large gains in areas and populations. In addition, petitioner provided an engineering study demonstrating that the allotment of Channel 221C3 to Tyler will not cause any significant impact on existing or future noncommercial educational services in the area.

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at Tyler; the substitution of Channel 256A for Channel 221A at Fairfield; and the substitution of Channel 277A for Channel 221A at Commerce, since the proposal could provide all the communities with better reception service. Channel 221C3, Channel 256A, and Channel 277A can be allotted to Tyler, Fairfield and Commerce, respectively, in compliance with the Commission's minimum distance separation requirements. Channel 221C3 can be allotted to Tyler with a site restriction of 1.6 kilometers (1.0 miles) west to accommodate petitioner's desired site.[1] As proposed, Channel 256A and Channel 277A can be allotted to Fairfield and Commerce, respectively, at the transmitter sites specified in Station KNES-FM's and Station KEMM-FM's authorizations.[2] Therefore, we will direct an *Order to Show Cause* to the licensees of Station KNES-FM and Station KEMM-FM why their licenses should not be modified to specify operation on Channel 256A and Channel 277A as proposed herein instead of the present Channel 221A.

4. As requested, we shall propose to modify the license of Station KDOK-FM at Tyler, Texas, to specify operation on Channel 221C3. In accordance with Section 1.420(g) of the Commission's Rules we will not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Tyler, Texas.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tyler, Texas	221A, 226C1 268C, 281C2	221C3, 226C1 268C, 281C2
Fairfield, Texas	221A	256A
Commerce, Texas	221A	277A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Freestone Broadcasting Company, Inc., and KEMM Communications, Inc., respective licensees of Station KNES-FM, Fairfield, Texas, and Station KEMM-FM, Commerce, Texas, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channel 256A and 277A as proposed herein instead of the present Channel 221A.

7. Pursuant to Section 1.87 of the Commission's Rules, Freestone Broadcasting Company, Inc. and KEMM Communications, Inc., may, not later than August 29, 1994, file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Freestone Broadcasting Company, Inc. and KEMM Communications, Inc. to furnish additional information. If Freestone Broadcasting Company, Inc. and KEMM Communications, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter

[1] The coordinates for Channel 221C3 at Tyler are North Latitude 32-20-42 and West Longitude 95-10-08.

[2] The coordinates for Channel 256A at Fairfield, Texas, are North Latitude 31-41-52 and West Longitude 96-09-44. The coordinates for Channel 277A at Commerce, Texas, are North Latitude 33-11-40 and 96-01-20.

of modification for hearing. If no written statement is filed by the date referred to above, Freestone Broadcasting Company, Inc. and KEMM Communications, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to:

Freestone Broadcasting Company, Inc.
P.O. Box 347
Fairfield, Texas 75840
(Licensee of Station KNES-FM)

KEMM Communications, Inc.
900 Jackson
Dallas, Texas 75202
(Licensee of Station KEMM-FM)

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **August 31, 1994,** and reply comments on or before **September 18, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

M. Scott Johnson, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900E
Washington, D.C. 20005
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-72

In the Matter of

Amendment of Section 73.202(b), RM-8479
Table of Allotments,
FM Broadcast Stations.
(Odessa and Los Ybanez, Texas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 23, 1994; Released: July 8, 1994

Comment Date: August 31, 1994
Reply Comment Date: September 18, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ruben Velasquez ("petitioner"), permittee of Station KADM-FM, Channel 299C2 at Odessa, Texas, requesting substitution of Channel 300C1 for Channel 299C2 at Odessa and modification of Station KADM-FM's construction permit to specify operation on the higher powered channel. To accommodate the upgrade at Odessa, petitioner also requests the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas. Petitioner states that he will apply for Channel 300C1, if allotted.

2. In support of his proposal, petitioner states that the site restriction presently imposed on Channel 299C2 at Odessa, prevents him from providing Odessa with the requisite city grade signal. Petitioner contends adoption of his proposal would cure the service deficiency while providing service to an additional 116,510 persons. Petitioner notes that his channel substitution proposal at Los Ybanez does not require a change of transmitter site for Station KYMI-FM. Petitioner acknowledges his responsibility to compensate the licensee of Station KYMI-FM for the reasonable expenses associated by changing channels at Los Ybanez.

3. We believe the public interest would be served by proposing the substitution of Channel 300C1 for Channel 299C2 at Odessa, Texas, and the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas, since it could enable Station KADM-FM to improve its service to the public. Channel 300C1 can be allotted to Odessa in compliance with the Commission's minimum distance requirements without the imposition of a site restriction.[1] Channel 253C2 can be allotted to Los Ybanez in compliance with the Commission's minimum distance separation requirements and can be used at Station KYMI-FM's license site.[2] To accommodate the upgrade at Odessa, we will direct an *Order to Show Cause* to the licensee of Station KYMI-FM why its license should not be modified to specify operation on Channel 253C2 in lieu of Channel 300C2. In addition, concurrence of the Mexican government has been solicited for these allotments since Odessa and Los Ybanez are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. As requested, we also propose to modify the construction permit for Station KADM-FM at Odessa to specify operation on Channel 300C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 300C1 at Odessa or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Odessa, Texas	241C2, 245C1, 250C1,[3] 256C, 299C2	241C2, 245C1, 250C1,256C, 300C1
Los Ybanez, Texas	300C2	253C2

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Israel Ybanez, licensee of Station KYMI-FM, Los Ybanez, Texas, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 253C2 as proposed herein instead of the present Channel 300C2.

7. Pursuant to Section 1.87 of the Commission's Rules, Israel Ybanez may, not later than August 29, 1994, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Israel Ybanez to furnish additional information. If Israel Ybanez raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Israel Ybanez will be deemed to have consented to the modification as proposed in the

[1] The coordinates for Channel 300C1 at Odessa are North Latitude 31-51-30 and West Longitude 102-22-30.
[2] The coordinates for Channel 253C2 at Los Ybanez are North Latitude 32-43-22 and West Longitude 102-01-50.
[3] We recognize that the Odessa upgrade to Channel 300C1 conflicts with the Channel 250C allotment at Odessa, Texas. However, by letter dated July 31, 1992, the FM Branch cancelled the expired construction permit (BPH-870226IM) for Station KODM-FM, Odessa, Texas. No appeal of this cancellation has been received. Pursuant to the Commission's Public Notice entitled "Reclassification of FM Facilities Pursuant to BC Docket No. 80-90, 2 FCC Rcd 2124 (1987), the pre-Docket 80-90 allotment is automatically downgraded to the class of the licensed facility upon the expiration of a higher class construction permit. Consequently, the Commission has now downgraded KODM-FM's facility from Class C to C1.

Order to Show Cause and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to Israel Ybanez, No. 15, Los Ybanez, Texas, 79331 (licensee of Station KYMI-FM).

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **August 31, 1994,** and reply comments on or before **September 18, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Wells King, Esq.

Haley, Bader & Potts

4350 North Fairfax Drive

Suite 900

Arlington, Virginia 22203-0606

(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TOTAL-TEL USA COMMUNICATIONS, INC.
Complainant,

v. File No. E-94-31

NEW YORK TELEPHONE COMPANY
Defendant.

ORDER

Adopted: June 30, 1994; Released: July 8, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 30, 1993, Total-Tel USA Communications, Inc. (Total-Tel) filed the above-captioned complaint against New York Telephone Company (NYT) alleging that NYT had violated Section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(b), by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1989 through December 31, 1990. Total-Tel has now filed a request to dismiss the complaint with prejudice, indicating that the issues rased by the complaint have been satisfactorily resolved by the parties.

2. We are satisfied that dismissal of the Complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Request for Dismissal of Complaint filed by Total-Tel USA Communications, Inc. IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VACATION NETWORK, INC.
Complainant,

v. File No. E-93-012

SPRINT COMMUNICATIONS COMPANY,
LIMITED PARTNERSHIP
Defendant.

ORDER

Adopted: June 30, 1994; Released: July 8, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 13, 1992, Vacation Network, Inc. (VNI) filed the above-captioned Complaint against Sprint Communications Company, Limited Partnership (Sprint) alleging that Sprint violated the Communications Act of 1934, as amended, by attempting to collect charges for unauthorized interstate and international calls that were either originated or accepted at one of VNI's payphone locations. Sprint denied the allegations and moved to dismiss the complaint. The parties subsequently entered into negotiations aimed at resolving the complaint. VNI has now filed a motion to dismiss the complaint with prejudice, stating that a satisfactory agreement has been reached.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Motion to Withdraw Complaint filed by Vacation Network, Inc. IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER CABLE CSR-4231-P

Petition for Public Interest Determination
under 47 C.F.R. § 76.1002(c)(4)
Relating to Exclusive Distribution of
Courtroom Television

MEMORANDUM OPINION & ORDER

Adopted: June 1, 1994; Released: June 1, 1994

By the Commission: Commissioners Ness and Chong not participating in the decision.

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I. INTRODUCTION

1. The Commission has before it a petition filed by Time Warner Cable ("Time Warner"), a cable operator, requesting a public interest determination pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules authorizing Time Warner to enforce an exclusive distribution agreement with Courtroom Television ("Court TV"), a cable programming network. Time Warner contends that the relief requested is authorized by and consistent with the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[1] and is in the public interest. The petition was placed on public notice March 16, 1994. Oppositions to the petition were filed by Liberty Cable ("Liberty"), a satellite master antenna television operator and a competitor to Time Warner in Manhattan, on April 15, 1994,[2] and by the New York State Attorney General ("NYAG") on April 15, 1994. On April 25, 1994 Time Warner filed its response to the oppositions.

2. Based on the record before us, and pursuant to the criteria set forth in the 1992 Cable Act, we have determined that continued enforcement of this exclusive contract is not in the public interest, and therefore, Time Warner's petition is denied. Furthermore, the Commission determines that the exclusive provisions of the contract between Time Warner and Court TV may not be used to deny programming to any multichannel video programming distributor ("MVPD"). The following is a discussion of the Commission's findings and analysis of the public interest factors involved in this petition.

II. BACKGROUND

3. Section 628(c)(2)(D) of the 1992 Cable Act provides that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.[3] In determining whether the proposed exclusivity is in the public interest, the statute directs the Commission to consider five specific factors:

> (a) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
>
> (b) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
>
> (c) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
>
> (d) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
>
> (e) the duration of the exclusive contract.[4]

Time Warner's petition seeks such a public interest determination on its exclusivity for Court TV.

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] We note that Liberty attached a copy of its pending program access complaint to its opposition. In reviewing this petition, the Commission did not consider the complaint because the Cable Services Bureau has held it in abeyance pending our decision with respect to Time Warner's petition. *See Complaint of Liberty Cable Company v. Courtroom Television Network, Order,* CSR 4242-P, DA 94-397 (adopted March 25, 1994).

[3] Section 628(c)(2)(D) of the Communications Act of 1934, *as amended* (hereinafter, the "Communications Act"), 47 U.S.C. § 548(c)(2)(D). Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against "practices, understandings, arrangements and activities," including exclusive contracts ... between a cable operator and a [vertically integrated programming vendor]" in areas not served by a cable operator as of October 5, 1992. *See* 47 U.S.C. § 548(c)(2)(C). We note that this *per se* prohibition against exclusivity is not implicated in this case because the petition seeks authority for exclusive distribution in served areas only.

[4] *See* Communications Act § 628(c)(4), 47 U.S.C. § 548(c)(4).

4. According to petitioner, Court TV began its operations on July 1, 1992. Court TV provides 24 hour programming consisting of live and taped coverage of courtroom trials, hearings or similar proceedings, plus related commentary, legal commentary, legal news and other legal materials.[5] Court TV is delivered to approximately 704 affiliates throughout the country and to 13.2 million subscribers, according to Time Warner's pleading.[6] Time Warner entered into a contract with Court TV granting it the exclusive right to exhibit and distribute Court TV in areas served by Time Warner for ten years commencing July 2, 1991, which can be renewed at Time Warner's option until 2006.[7] The petitioner states that its request for exclusivity is nationwide in scope[8] and includes the language of the contract that defines the exclusive distribution rights, which apply in "Operating areas of the cable television systems set forth by Affiliate on Schedule 1,"[9] Schedule 1 of the contract, however, is not included in the petition. Moreover, Time Warner's pleadings contain no information on the actual areas or markets that may be affected by its proposed exclusivity.

5. The petition states that Time Warner Cable is a division of Time Warner Entertainment Company ("TWE"). TWE is majority owned by Time Warner, Inc. ("TWI"). TWE consists principally of three unincorporated divisions, including Time Warner Cable which operates cable systems.[10] TWI and TWE have an ownership interest in Court TV.[11]

6. The petition further states that Court TV is owned by a combination of cable operators and broadcasters: Time Warner, Liberty Media, Cablevision Systems and NBC. Time Warner is the largest investor in Court TV, and an affiliate of Time Warner is the managing partner of Court TV.[12]

7. Thus, the petition acknowledges that Time Warner's ownership of Court TV constitutes an "attributable interest" under the standards set forth in Section 76.1000(b) of the Commission's rules, making Court TV a vertically integrated programming vendor subject to our program access rules.[13] Accordingly, Court TV may not provide a cable system affiliate the exclusive right to distribute Court TV within the operator's franchise area without an affirmative determination by the Commission that such exclusive distribution meets the public interest criteria set forth in Section 628(c)(4) of the 1992 Cable Act.[14]

8. In its opposition, Liberty states that it is a satellite master antennae television ("SMATV") system which distributes video programming to 15,000 subscribers throughout New York City (12,000 in Manhattan) and provides video programming service to three multiple-dwelling units in Manhattan via New York Telephone's video dialtone trial.[15] Although Time Warner's pleadings do not include subscriber information relating to the systems for which its proposed exclusivity applies, the Oppositions submit into the record the fact that Time Warner provides service to 6.9 million subscribers in the United States, 1.3 million in New York and 850,000 in New York City,[16] and 500,000 subscribers in Manhattan.[17] The NYAG Opposition states that under the statutory definitions, Time Warner systems in New York State are not subject to effective competition from Liberty or other MVPDs.[18]

III. SUMMARY OF PLEADINGS

9. Time Warner supports its request for exclusivity by citing language in the *Program Access Order* that "exclusive programming that is not designed to kill the competition is still permitted."[19] Time Warner argues that it only seeks to enforce exclusive contracts with three of the 60 total programming services subject to the program access rules that it carries.[20] Furthermore, Time Warner points out that pursuant to a consent decree approved by a federal court, it has agreed not to enforce its exclusive distribution rights against direct broadcast satellite ("DBS") providers.[21] Time Warner concludes that such limited exclusivity overall does not implicate the competitive concerns that motivated Con-

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[5] Petition at 8.

[6] Petition, Exhibit C, Subscriber Count Database, *Cablevision* (Dec. 6, 1993) at 106.

[7] Petition at 9. The agreement provides Time Warner the exclusive right to:

> "exhibit and distribute the Service by cable or other wire transmission service ('Cable'), in the Operating Areas of the cable television systems set forth by Affiliate on Schedule 1" and the exclusive right "to distribute to and to authorize the reception of the Service in Operating Areas of the Systems by satellite master antenna television systems ('SMATV'), multipoint distribution services ('MDS'), multichannel multipoint distribution services ('MMDS'), by or to any viewer or viewers by means of equipment capable of receiving audio/visual signals and/or programming directly from a satellite . . . and by any other means of distribution whether now existing or developed in the future . . . ."

[8] Time Warner Reply at 1, n.1.

[9] Petition at 8-9.

[10] Petition at 2. The other two divisions are Home Box Office, which wholly owns HBO and Cinemax (premium programming services) and is a 50% owner of Comedy Central (non-premium programming service), and Warner Bros. which produces and distributes motion pictures and television programs.

[11] Petition at 2, n.2. TWI and TWE also have ownership interests in E! Entertainment Television, The Cartoon Network, CNN, Headline News, TBS, TNT, BET, QVC Network, and QVC Fashion Channel.

[12] Petition at 8, n.4.

[13] *See* 47 C.F.R. § 76.1000-1003.

[14] *See First Report and Order, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265 (*"Program Access Order"*) 8 FCC Rcd 3359, 3384 (1993), *recon. pending. See also* para. 3, *supra*.

[15] Liberty Opposition at 2.

[16] NYAG Opposition at 4.

[17] Liberty Opposition at 2.

[18] NYAG Opposition at 4.

[19] Petition at 5 (quoting *Program Access Order* 8 FCC Rcd at 3384, ¶ 63, quoting in turn 138 Cong. Rec. H6534 (statement of Rep. Tauzin)(daily ed. July 23, 1992)).

[20] Petition at 3. In addition to this petition for exclusivity for Court TV, Time Warner has submitted another petition seeking exclusivity for Prime Ticket Network, which was placed on public notice April 7, 1994. Time Warner also has the exclusive right to distribute a third programming service, Turner Network Television, Inc. ("TNT"), within the franchise areas of its cable systems. The contract for TNT was entered into prior to June 1, 1990, and, therefore, is grandfathered by Section 19(h) of the 1992 Cable Act. 47 U.S.C. § 548(h).

[21] Petition at 4.

gress to enact the program access provisions. Time Warner argues that the congressional concerns over restrictions to program access resulting from vertical integration in the cable industry are not triggered because only two petitions for exclusivity have been put on public notice.[22] Time Warner claims that by examining the overall amount of programming excluded in the industry, the Commission can guard against anticompetitive use of vertical ownership by limiting the number of exclusive agreements with vertically integrated programming vendors to a reasonable level.[23] Time Warner argues that exclusivity covering only three out of 60 services for which it could petition for exclusivity is a "reasonable amount" and is not the "killer" exclusivity the rules address.[24]

10. Time Warner argues that the exclusive contract with Court TV does not affect competition because ample alternate sources of programming are available to competing MVPDs. Time Warner points out that over 80 national programming services, a dozen regional services and other pay services are currently available, and many new services will soon be available, to MVPD competitors.[25] Time Warner argues that competitors could also fund and develop new programming services themselves.[26] In addition, Time Warner claims that exclusivity promotes diversity of programming because it encourages the creation of alternate programming.[27] Time Warner claims that Liberty is trying to avoid expending resources to create programming, and is instead trying to "free ride" off of Time Warner's investment.[28]

11. Time Warner also argues that exclusivity promotes competition because its exclusive offering of Court TV allows Time Warner to differentiate its product in the market.[29] Time Warner states that its exclusive contract does not restrict competition, but rather provides an incentive for Liberty to create a way to appeal to consumers and to distinguish itself from Time Warner. Time Warner argues that Liberty's ability to duplicate Time Warner's offering is not necessary for Liberty to compete.[30]

12. Time Warner argues that granting its petition would only foreclose an inconsequential amount of programming to competitors, and further argues that Court TV is not an essential facility for which access is required or necessary for the survival of a competitor.[31] Time Warner supports its point with a finding by the New York City Department of Telecommunications and Energy ("NY DTE") that the Court TV-Time Warner exclusive agreement served a legitimate business need, was not an unreasonable foreclosure on programming, and was not essential to Liberty's ability to compete.[32]

13. Time Warner further argues that the exclusive contract with Court TV does not harm competition in the national or local MVPD market because many competitors survive without Court TV. Out of a potential 60 million subscribers, only 13.2 million subscribe to Court TV, and Time Warner presumes that those operators who choose not to carry Court TV are successful without it.[33] Moreover, Time Warner contends that, even without Court TV, Liberty is a successful competitor that claims to offer service superior to that of Time Warner.[34]

14. In its opposition, Liberty responds that the fact that many alternate programming services are available to MVPD competitors is not determinative; in fact, it contends that acceptance of this argument would eviscerate enforcement of Section 628(c) because any single exclusive contract would naturally only limit a competitor's access to a relatively small percentage of programming in the market.[35] Liberty argues that the relevant inquiry is whether the exclusive contract increases competition, not whether it has a benign impact on competition. Liberty responds that Time Warner's argument that a competitor could fund an alternate service to Court TV minimizes the cost of starting a competing service, which is inconsistent with Time Warner's other arguments attempting to show the high risk and expense of launching and operating Court TV.[36]

15. Moreover, in response to Time Warner's contention that Court TV is not an essential facility, the NYAG argues that nowhere does the Act, legislative history or Commission rules suggest that the "essential facility" doctrine applies; if it did, the five statutory public interest factors would have no significance.[37] The NYAG Opposition further argues that Time Warner's analysis of whether the programming market is foreclosed confuses the analysis of the effect on the distribution market with the effect on the production market.[38] Liberty further points out that in the proceeding before the NY DTE, *Liberty* had the burden of proof that *Time Warner's* conduct was unreasonable. In this proceeding, however, Liberty argues the 1992 Cable Act presumes that such conduct hurts competition and, unlike the proceeding before NY DTE, Time Warner has the burden of demonstrating that competition is unaffected by the denial of access to Court TV.[39]

16. In response to Time Warner's claim that many cable operators survive without Court TV, Liberty contends that the fact that many monopoly cable systems do not carry Court TV is not probative; subscribers to monopoly cable systems retain an incentive to subscribe regardless of the programming offered. In contrast, subscribers in a competitive market will have less incentive to subscribe to one MVPD that fails to carry a desired service that is carried by the competing MVPD.[40] The fact that Liberty possesses only

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[22] Time Warner Reply at 5, n.3. We note that since Time Warner's reply a third petition for exclusivity was placed on public notice. *See* n.20, *supra*.
[23] Time Warner Reply at 4.
[24] Petition at 6.
[25] Petition at 11.
[26] Petition at 12.
[27] Petition at 18.
[28] Petition at 13; Time Warner Reply at 13.
[29] Petition at 11.
[30] Time Warner Reply at 10.
[31] Petition at 15.
[32] *Id.* Liberty had challenged the legality, on antitrust grounds, of the Time Warner-Court TV exclusive contract before the NY DTE, Time Warner's franchising authority.
[33] Petition at 12.
[34] Petition at 14.
[35] Liberty Opposition at 8.
[36] Liberty Opposition at 9.
[37] NYAG Opposition at 6.
[38] NYAG Opposition at 7.
[39] Liberty Opposition at 9.
[40] Liberty Opposition at 8.

a two percent market share in Manhattan, Liberty argues, is proof that Time Warner's exclusive contract limits competition.[41] Liberty contends that potential subscribers have refused to subscribe to Liberty's services specifically because Liberty does not offer Court TV.[42]

17. Time Warner argues that exclusivity is in the public interest because the ability to secure exclusivity attracted capital investments at launch of the service and continues to attract investments by Time Warner.[43] Time Warner claims that exclusivity was the necessary incentive for investment in the launch, development and continued promotion of Court TV.[44] Time Warner contends that Court TV has been unprofitable in its first two years and will require more financing from its investors.[45] Time Warner states that it would not have carried Court TV at launch without the grant of exclusive rights.[46] Time Warner claims that to disallow exclusivity here deprives Time Warner of its benefit of the bargain, and would chill future incentives to invest in new programming.[47] Time Warner agrees that exclusivity is not always necessary, but in this case, it contends that exclusivity played a critical role in Time Warner's decision to invest in and carry Court TV.[48]

18. Liberty responds that the past investment requirements of Court TV are irrelevant to the issue of continued enforcement of exclusivity.[49] Liberty argues that Time Warner offers no proof that it would not have invested in Court TV without exclusivity.[50] The opposition argues that all exclusive agreements provide incentives to investors, and the 1992 Cable Act was enacted notwithstanding this fact.[51] Liberty further claims that Court TV can enter into exclusive agreements with unaffiliated cable companies.[52]

19. Time Warner further argues that exclusivity is needed for twelve more years, until 2006, because Court TV will not cover its expenses for several years due to its slow growth.[53] Time Warner presents evidence that in the first two years Court TV grew slowly and did not show a profit.[54] Time Warner states that profitability is not anticipated until 1996, and that Time Warner's return on its investment is even farther in the future.[55] Liberty responds that Court TV is one of the fastest growing networks.[56] Liberty presents evidence that in the year ending January 31, 1994, Court TV increased its subscribership by 84 percent, and that Court TV's net subscribers increased by an average of 37,500 every business day from December 6, 1993 to January 31, 1994.[57] Liberty contends that viewers with a four year college education watch Court TV at a higher rate than other cable networks. Liberty further states that in a market like Manhattan with a highly educated population, Court TV is in high demand.[58] Moreover, Liberty notes that few networks are profitable in the first two years.[59] Liberty also claims that exclusivity delays profitability because it restricts additional revenues that can be derived from selling the service to other distributors.[60]

20. Time Warner argues that given the slow growth of Court TV, and the time needed to cover its expenses, continued exclusivity for eight years, or for twelve years if Time Warner renews its contract, is reasonable.[61] Time Warner further contends that because the other factors weigh so heavily in favor of finding that exclusivity is in the public interest, the duration of the contract should not be the determinative factor.[62] Time Warner contends that its exclusivity petition should not be required to pass muster under each of the five public interest criteria; rather, the Commission should consider the criteria as a whole.[63]

21. Time Warner presents an antitrust analysis of exclusive dealing arrangements, and argues that the exclusive arrangement with Court TV is not suspect under antitrust law.[64] Time Warner states that while antitrust analysis is not required, it does inform the public interest inquiry. Time Warner states that the standard of review for such vertical agreements is whether there is a sufficient showing that the exclusivity restrains competition in the relevant market.[65] Time Warner argues that its competitors are not foreclosed because they have found alternate sources of supply.[66] Time Warner contends that even if there were a "programming market," it is not foreclosed because the exclusive contract represents only a fraction of the market.[67] Further, Time Warner contends that actual experience with the exclusive contract at issue reflects that there has been no unreasonable restraint on competition.[68]

22. Liberty responds that antitrust evidence is irrelevant to the statutory public interest showing.[69] Liberty contends that Congress considered and rejected using antitrust evidentiary standards for program access complaints.[70]

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41 Liberty Opposition at 10.
42 Liberty Opposition at 12.
43 Petition at 16-17; Time Warner Reply at 12.
44 *Id.*
45 Petition at 17.
46 Petition at 18.
47 Time Warner Reply at 12.
48 Time Warner Reply at 19, n.13.
49 Liberty Opposition at 18.
50 Liberty Opposition at 13.
51 Liberty Opposition at 14.
52 Liberty Opposition at 14. Time Warner correctly responds that this statement is not true. Time Warner Reply at 8. The prohibition against exclusive contracts with vertically integrated programming vendors applies to *all* cable operators, not just affiliated operators. Communications Act, § 628(c)(2)(D), 47 U.S.C. § 548(c)(2)(D). Thus, prior to execution or enforcement of an exclusive contract between a vertically integrated programming vendor and *any* cable operator, the operator or programming vendor must petition the Commission for a determination that the proposed exclusivity is in the public interest. *See* 47 C.F.R.§ 76.1002(c)(5).
53 Petition at 18-19.
54 Petition at 18, 17.
55 Petition at 18-19.
56 Liberty at 19.
57 Liberty Opposition at 11.
58 *Id.*
59 Liberty Opposition at 13.
60 Liberty Opposition at 15.
61 Petition at 10. Time Warner concedes that the Commission may grant the exclusivity for a period of time shorter than that requested by the petitioner. Time Warner Reply at 17.
62 Petition at 19.
63 Petition at 11.
64 Petition at 20; Time Warner Reply at 17.
65 Petition at 20-22; Time Warner Reply at 17-18.
66 Petition at 22; Time Warner Reply at 18.
67 Petition at 22.
68 Time Warner Reply at 18.
69 Liberty Opposition at 21.
70 Liberty at 21 and 6 (citing House floor debates on level of proof required of petitioners, 138 Cong. Rec. H6532-44 (daily ed. July 23, 1992)).

Moreover, Liberty argues that the exclusive contract "is presumptively illegal under Section 2 of the Sherman Act given Time Warner's monopoly over cable television service in Manhattan."[71] NYAG claims that Time Warner's argument on the effect on programming demand confuses the distribution and production markets.[72]

IV. ANALYSIS

23. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market.[73] When adopting the statute, Congress was concerned by its finding that the majority of cable operators enjoyed a monopoly in program distribution at the local level,[74] and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.[75] In addition, Congress found that increased horizontal concentration of cable operators together with extensive vertical integration has created an imbalance of power between operators and unaffiliated programming vendors, and operators and their multichannel competitors, which also impedes the overall development of competition.[76]

24. Thus, in the 1992 Cable Act, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable, and prohibited such exclusive contracts within areas served by cable absent a specific public interest showing, for a period of ten years.[77] Such Congressional restrictions on exclusive contracts for this ten-year period are intended to foster the development of emerging competitors to cable, allowing a transition to full competition in the distribution market for programming.

25. Congress recognized, however, that in areas served by cable, some exclusive contracts between vertically integrated programming vendors and cable operators may provide countervailing benefits to the programming market or to the development of competition among distributors.[78] Congress provided that where such an exclusive contract is demonstrated to be in the public interest, it should be allowed. The public interest criteria set forth in the 1992 Cable Act include consideration of the benefits to the programming market that exclusivity in areas that are served by cable may provide in a particular case, which can ultimately rebut the presumption inherent in the statute's program access provisions that the use of exclusivity between vertically integrated programming vendors and cable operators frustrates the development of competition.

26. Any agreement between a vertically integrated programming vendor and a cable operator that grants a cable operator the exclusive right to distribute programming within its franchise area must be approved by the Commission before it may be enforced.[79] Congress specifically provided that our regulations "shall . . . prohibit exclusive contracts . . . unless the Commission determines . . . that such contract is in the public interest.[80] We construe that sentence to place the burden of proof (both the burden of production and persuasion) on the proponent of an exclusive agreement.[81] Given Congress' express desire to foster the development of competition in the market for distribution of video programming, any party seeking a determination that such an agreement meets the statutory public interest standard bears the burden of demonstrating that the proposed exclusivity provides sufficient public interest benefits to outweigh the presumptively anticompetitive effect on competing distributors.

27. The Commission has determined that it will examine petitions for exclusivity on a case-by-case basis.[82] When engaging in this type of examination, we will examine the effect of a particular exclusive contract on each of the factors listed in Section 76.1002(c)(3) of our rules. We agree with Time Warner that the public interest criteria must be considered as a whole in making the statutory determination. Thus, we must examine whether the proponent of exclusivity has met its burden of demonstrating that the statutory presumption that the public interest is served by requiring open access by emerging competing distributors to the programming at issue is offset by countervailing public benefits derived from allowing exclusive agreements in order to create incentives for investment in the development and distribution of services that will promote diversity in the programming market.

28. Our application of the public interest standard will begin with an evaluation of the effect of the proposed exclusivity on the development of competition in the distribution market. The statute requires the Commission to consider the effect of the proposed exclusivity on the development of competition in the local and national multichannel video programming distribution markets, and on competition from multichannel video programming distribution technologies other than cable. In conjunction with this examination, we believe it is appropriate to evalu-

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[71] Liberty at 21 (emphasis omitted) (citing Areeda and Turner, Antitrust Law at § 731e (1971)).

[72] NYAG Opposition at 7.

[73] *See* Communications Act § 629(a), 47 U.S.C. § 548(a).

[74] 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Cong., 2d Sess. (1992)("House Report") at 42.

[75] 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 25-26.

[76] *See Program Access Order*, 8 FCC Rcd at 3366.

[77] *See* Communications Act §§ 628(c)(2), (4), and (5), 47 U.S.C. §§ 548(c)(2), (4), and (5).

[78] *See* Communications Act §§ 628(c)(2), (4), 47 U.S.C. §§ 548(c)(2), (4).

[79] *See Program Access Order*, 8 FCC Rcd at 3386.

[80] *See* Communications Act § 628 (c)(2)(D), 47 U.S.C. § 548(c)(2)(D).

[81] In *Panhandle Producers v. Economic Regulatory Ass'n*, 822 F.2d 1105 (D.C. Cir. 1987), the court addressed similar language in considering a challenge to an administrative presumption favoring import authorization. The language at issue stated that "ERA '*shall* issue . . . [an import authorization] order upon application, *unless* . . . it finds that the proposed exportation or importation will not be consistent with the public interest.'" *Id.* at 1111 (emphasis by the court). The court said that "[a] presumption favoring import authorization . . . is completely consistent with, if not mandated by, the statutory directive." *Id.* In this case, the statute provides that the Commission *shall* prohibit exclusive agreements, *unless* the Commission determines that the contract serves the public interest. Accordingly, a presumption favoring the prohibition of exclusivity agreements is entirely consistent with the statute.

[82] *See Program Access Order*, 8 FCC Rcd at 3385.

ate the geographic extent of the proposed exclusivity to identify the relevant markets within which the proposal may affect the development of competing distributors.

29. Next, we will examine whether the petitioner has demonstrated that the proposed exclusivity benefits the public by creating incentives to invest in and support the creation and distribution of new and diverse programming. Exclusivity may be in the public interest where it is essential to the financial viability of the programming service. We will also examine whether the petitioner has demonstrated that the proposed exclusivity promotes diversity in programming. Exclusivity may enhance program diversity, for example, by encouraging promotion and carriage of programming which has a unique audience or subscriber appeal, or a limited distribution potential.

30. Finally, we will examine the duration of the proposed exclusivity. We will evaluate whether the proposed exclusivity has been sufficiently tailored to provide exclusivity for the minimum time period reasonably required to achieve the public interest benefits identified by the petitioner without imposing the kind of effect on the development of competition in the distribution market that Congress sought to ameliorate through the program access provisions.

A. Effects of Exclusivity on the Development of Competition in the Distribution Market

31. We have noted that Congress intended, by enacting the program access provisions of the 1992 Cable Act, to foster the development of "facilities-based" competition, which is defined as competition among distributors.[83] Cable systems have generally developed without effective competition. As noted in the *Program Access Order*, in order for "facilities-based" competition to develop, "access to programming is an essential prerequisite."[84] The statutory public interest factors thus address two aspects of the development of competition to cable. One statutory factor requires the Commission to consider the effect on the development of competition in local and national programming distribution markets; another statutory factor requires the Commission to consider the effect on competition from MVPD technologies other than cable.[85]

32. While Congress and the Commission recognize the benefits of exclusivity in certain circumstances, the Act "clearly place[s] a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry."[86] Finding that grants of exclusive distribution rights by vertically integrated programming vendors have been used by affiliated cable operators to limit competition from other distributors, Congress presumed that such exclusive contracts act as a barrier to entry into the MVPD market. However, petitions for exclusivity may rebut this presumption with a showing that competitive entry is not affected, or that any effects are minimal compared to countervailing public interest benefits to the programming market. We will examine together the effects of exclusivity on competition from alternate technologies and on the development of competition in the distribution market.

33. In considering the effect of denying an emerging competitor access to popular programming, we first address Time Warner's claims that its proposed exclusivity meets the public interest standard because Time Warner's competitors are not harmed by such exclusivity. At the outset, we note that the public interest analysis does not require a specific showing of "harm" to competitors by those opposing exclusivity.[87] In exclusivity petitions the burden of demonstrating that the contract is in the public interest is on the party seeking to exclude competitors. The Commission must consider the five specified statutory public interest factors in evaluating exclusivity petitions. We do not contend that harm to competitors is wholly irrelevant in exclusivity petitions, but believe that it is properly evaluated under the factors addressing the effect of the proposed exclusivity on the development of competition in the local and national distribution market, and not as a separate factor.

34. Next, with respect to consideration of the effect of exclusivity on the development of competition generally in local and national markets, Time Warner argues that exclusivity arrangements allow a distributor to differentiate itself from its competitors, while providing it with a strong incentive to aggressively promote a particular product. In this manner, Time Warner notes, exclusive distributorships may serve to enhance "interbrand" competition (competition at the production level) between products, and are often thought of as pro-competitive. Relying on *Futurevision Cable Systems v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 769 (S.D. Miss. 1992), Time Warner urges that our determination under the 1992 Cable Act hinges on whether the exclusive contract has anticompetitive effects on interbrand competition in the programming market. Thus, Time Warner argues that such arrangements are typically lawful under this type of antitrust analysis, and should be permitted under the Cable Act as well.

35. While an analysis under the antitrust laws of the effects of an exclusive contract for programming is relevant to our public interest determination, we do not view such an analysis as dispositive in this case. Given Congress' focus on fostering competition in the delivery of multichannel video programming, the effect of the exclusive agreement on the development of competition in the distribution market and on actual competition from distributors such as Liberty is pivotal to our public interest

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[83] *Program Access Order*, 8 FCC Rcd at 3384, n.79 (quoting House Comm. on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong, 2d Sess., ("Conference Report"), at 93 (1992), *reprinted* in 138 Cong. Rec. H8332 (daily ed. Sept. 14, 1992)).

[84] *Id.* at 3384.

[85] Communications Act, §§ 628(c)(4)(A)-(B), 47 U.S.C. §§ 548(c)(4)(A)-(B).

[86] *Program Access Order*, 8 FCC Rcd at 3384.

[87] We note that in our first *Program Access Order*, the Commission decided that, in the context of complaints brought pursuant to § 628(c), complainants need not prove that they have been harmed by an alleged violation, because the statute presumes that the behavior specifically prohibited by Congress harms competitors. 8 FCC Rcd at 3377. This issue is currently before the Commission in a petition for reconsideration. *See* Petition for Reconsideration of Liberty Media Corporation, filed June 10, 1993, in MM Docket 92-265. Petitions brought by a party seeking approval of exclusivity, however, require a statutory public interest evaluation under the criteria identified by Congress. Thus, the issue concerning whether a "complainant" must demonstrate harm, which is pending on reconsideration, is not implicated herein.

determination under the Act.[88] In enacting the program access provisions of the Cable Act, Congress recognized that by controlling access to programming, cable operators developed a monopoly over the distribution of programming in most markets. Through these provisions, Congress sought to facilitate the introduction of effective competition to cable operators by providing access to programming to all distributors on a non-discriminatory basis and prohibiting exclusive contracts except under very limited circumstances. In our view, it would be flatly inconsistent with the Cable Act to find an exclusivity provision presumptively lawful simply because it might not rise to the level of a Sherman Act violation.[89] Thus, contrary to Time Warner's assertions, the 1992 Cable Act requires a separate analysis of the competitive effects of the proposed exclusivity under the specific factors identified in the Act that is distinct from a traditional antitrust analysis.

36. In evaluating the effect of Time Warner's proposed exclusivity on the development of competition in the local distribution market, we believe that the first local market relevant to our analysis is the Manhattan market, because Liberty has specifically opposed Time Warner's request for exclusivity in that market. We note that the record demonstrates that Liberty's market share in this market is insufficient to constitute effective competition to Time Warner under the 1992 Cable Act.[90] Because Liberty is the only existing MVPD competitor to Time Warner in Manhattan, we believe that Time Warner must demonstrate that continued enforcement of its exclusive contract has no limiting effect on Liberty's ability to develop as an effective competitor in this local market.

37. We believe that when a distributor possesses a predominant share of the relevant market, and that distributor seeks approval of exclusivity that would deny its competitors access to popular programming,[91] there is likely to be a limiting effect on the development of competition in that market. In this situation allowing exclusivity for Court TV, at best, would appear to simply maintain the non-competitive status quo in Manhattan. Thus, we believe that the proposed exclusivity will limit Liberty's ability to develop as an effective competitor, and will also limit the ability of other potential competitors to enter this market. The record reflects that Court TV is popular programming. Time Warner's advertising emphasizing its exclusive ability to carry Court TV demonstrates that Liberty's ability to compete in Manhattan is affected. Liberty contends specifically that denial of access to Court TV limits its ability to secure contracts for multichannel video programming distribution and to compete effectively against Time Warner.[92] We believe that denial of access to popular programming like Court TV inhibits Liberty's ability to develop, and thus restrains competition in this particular local market.[93]

38. In considering the effect of the proposed exclusivity on competition in other local MVPD markets and on the national MVPD market, we note that, unlike in *New England Cable News* (*"NECN"*),[94] the petition for exclusivity applies to all areas of the country in which Time Warner operates a cable system, not just Manhattan.[95] Time Warner argues that no other competitors have complained about the denial of access, and therefore, there is no effect on competition nationally. The fact that no other oppositions were filed, however, is not dispositive of whether there is an effect on the development of competition nationally. We believe that because Court TV is a programming service with a national appeal, denial of access to competitors in other areas may well limit the development of competition in other local distribution markets and in the national distribution market. However, we need not reach a definitive conclusion on the actual or prospective effect of the proposed exclusivity on competition in other local markets or the national market because, as discussed *infra*, we find that there are no public interest benefits to the program-

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[88] *See* Communications Act, §§ 628(c)(4)(A) and (B), 47 U.S.C. §§ 548(c)(4)(A) and (B).

[89] *See* 15 U.S.C. §§ 1, 2. Of course, antitrust concerns are relevant to our public interest determination under the 1992 Cable Act. *See, e.g., Paragon Cable Television v. FCC*, 822 F.2d 152, 154 (D.C. Cir. 1987)(antitrust issues of clear relevance in Commission's assessment of public interest); *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980)(*en banc*) (competitive considerations are an important element of the public interest). Thus, a finding that a particular exclusive arrangement clearly raises concerns under the antitrust laws would weigh heavily against any conclusion that the proposed exclusivity meets the statutory standard.

[90] Communications Act, § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B). The relevant test for effective competition is whether the franchise area is:

> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; *and* (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area *Id.*

In Manhattan, Time Warner has approximately 500,000 subscribers while Liberty has only 12,000 subscribers.

[91] *See* para. 44, *infra*.

[92] *See* para. 16, *supra*.

[93] We also agree with Liberty that the NY DTE finding that Court TV is not essential to Liberty's ability to compete is in no way conclusive in the public interest determination required by the 1992 Cable Act. The NY DTE proceeding was conducted prior to the passage of the statute. Furthermore, the burdens and evidentiary requirements in that proceeding differed from those required in evaluation of an exclusivity petition. There the burden was on the complainant, Liberty, to prove harm, whereas in this proceeding the burden is on Time Warner to affirmatively demonstrate that the exclusivity proposed in its petition is in the public interest.

[94] In *New England Cable News, Memorandum Opinion and Order, (*"*NECN*"*)* FCC 94-133, adopted June 1, 1994 , we granted a petition that requested exclusivity to a regional news network service for its cable affiliates within their franchise areas in the six New England states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut.

[95] We note, however, that Time Warner's petition does not indicate the specific local markets for which its proposed exclusivity applies, nor does Time Warner provide information on those markets that would aid our evaluation of the effect of the proposed exclusivity on competition in all local and national MVPD markets. The NYAG Opposition indicates that Time Warner systems have 6.9 million subscribers nationwide, however, we have no information before us relating to the markets where those subscribers are located.

ming market that could offset any actual or potential limiting effect on the development of competition in the local or national distribution markets.

39. With respect to our consideration of the effect on competition from MVPDs using alternate technologies, Time Warner attempts to minimize the effect of its proposed exclusivity on the development of such competition by arguing that Time Warner has previously agreed not to enforce its exclusivity against DBS providers that could provide additional competition to cable using alternate technologies.[96] While the exclusivity at issue here is not enforceable against DBS providers, the statutory public interest test requires us to consider the effect of exclusivity on *all* alternate technology competitors, not just DBS. Liberty is an emerging competitor to Time Warner throughout New York City using SMATV distribution as an alternate technology to cable. While potential competition from DBS is unaffected by Time Warner's contracts, Liberty as an existing alternate technology competitor to cable would clearly be affected by the proposed exclusivity. The effect of the proposed exclusivity on Liberty is, therefore, highly relevant, and we conclude that this effect weighs against a finding that such exclusivity is in the public interest.

40. Finally, Time Warner claims that it has judiciously limited its use of exclusivity by requesting exclusivity for only three of the 60 services it offers that are subject to the program access provisions of the 1992 Cable Act. Time Warner has suggested that it has minimized the use of exclusivity so that its competitors' ability to offer comparable service is not directly affected. This course of conduct is not enough to meet the public interest standard established by Congress. Even if an operator petitions for exclusivity on a limited number of services under the program access rules, this may not represent the complete extent of exclusivity that can be exercised by the operator. Exclusivity petitions are required only for satellite cable and broadcast programming services provided by vertically integrated programming vendors. Thus, an operator may hold exclusive contracts for any number of non-satellite services or services from non-vertically integrated programming vendors. Moreover, we believe that even a modest detrimental effect on competing distributors is strongly disfavored by the statute.

41. Thus, we determine that the facts indicate that continued enforcement of the proposed exclusivity by Time Warner will adversely affect competition in the local distribution market because of the impact on Liberty's ability to compete in Manhattan and throughout New York City.[97] Moreover, competition in other local distribution markets and in the national distribution market may be similarly adversely affected. In addition, continued exclusive distribution of Court TV by Time Warner denies a popular programming service to an emerging competitor that uses an alternate technology to cable. Accordingly, we conclude that the effects of the proposed exclusivity on both (1) the development of competition in the local and national distribution markets, and (2) competition from alternate technology competing distributors, weigh against a finding that continued enforcement of Time Warner's exclusive contract with Court TV is in the public interest.

B. Public Interest Benefits of Exclusivity on the Programming Market

1. Attraction of Capital Investments in Production and Distribution of Programming

42. The 1992 Cable Act requires the Commission to consider whether exclusivity serves as an investment incentive for cable operators to finance, promote and carry a new service.[98] Where a programming vendor requires the ability to offer an added investment incentive, such that without the incentive the programming service would not be launched or become viable, exclusivity may be in the public interest. We believe that Time Warner has failed to demonstrate that continued enforcement of its exclusive distribution rights for Court TV is required to attract capital investments for production, promotion, distribution, or carriage of Court TV.

43. The facts presented indicate that Court TV is an established cable network with a growing subscriber base. Time Warner has not demonstrated that exclusivity is necessary for the service to gain acceptance. Time Warner minimizes subscriber demand for Court TV by arguing that many cable systems choose not to carry Court TV. This is not, however, necessarily representative of the true subscriber demand for the programming. Liberty is correct to point out that a decision by a cable operator not to carry the service in other markets may not adequately represent consumer demand for the programming. Only in competitive markets where subscribers have a choice among distributors will consumer demand constitute one of the factors that clearly influences the choice of programming carried on a particular system. Moreover, unlike in *NECN*, which dealt with a programming service regional in nature and regional in appeal, the programming provided by Court TV is national in appeal, and its potential distribution is not necessarily limited by the nature of the service. Furthermore, as stated below, Court TV's popularity with viewers is demonstrated by its recent steady growth.

44. While exclusivity may serve as an incentive for operators to launch and promote a new service, our public interest determination is concerned with whether such an incentive is currently required by the particular programming at issue. Whether exclusivity may have provided an incentive to attract operators to carry Court TV when it was first launched is now irrelevant. Our inquiry relates to the effect of allowing continued exclusivity in the current environment. Today Court TV is an extremely popular programming service. The record indicates that in 1993, Court TV grew at the fastest rate of any cable network. We believe that its popularity creates incentives for all cable operators to market and add the service, particularly if a competitor carries it. While we recognize that exclusivity

[96] This agreement was made by Time Warner in the context of a consent decree resolving a federal antitrust action. *See State of New York, et al. v. Primestar Partners, L.P., et al.*, 1993-2 Trade Cas. (CCH), ¶ 70,403, § IV(C) (Sept. 14, 1993).

[97] By contrast in *NECN*, the record demonstrated that only minimal effects on competition in local distribution markets would occur from NECN's proposed exclusivity, which we found to be offset by public interest benefits in the programming market.

[98] Communications Act, § 628(c)(4)(C), 47 U.S.C. § 548(c)(4)(C).

for a successful programming service such as Court TV provides benefits to the cable investor, those private benefits must be weighed against the public benefits of allowing access by competitors. Time Warner cannot demonstrate that exclusivity remains necessary to ensure the survival of Court TV.

45. Moreover, we do not believe that the early investment losses sustained by Time Warner in support of Court TV alone can justify continued enforcement of the exclusive agreement, because few programming services are profitable in the first two years. We believe that factors other than early unprofitability are necessary to find exclusivity in the public interest. For example, one such factor may be limited distribution potential, due to the more localized appeal of a particular programming service, which may require the additional investment incentives provided by the ability to guarantee exclusivity. In the *Program Access Order*, the Commission recognized that such additional investment incentives may be required to launch local origination programming that "may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market."[99] Thus, for example, in granting the exclusivity petition in *NECN*, we noted, among other factors, that the regional nature of that particular programming service "places it in a significantly more precarious financial condition," than other services with broader audience appeal.[100] Court TV, however, does have broad audience appeal and a national distribution potential, and Time Warner has not presented any other factors to support a finding that Court TV now requires the additional investment incentive provided by exclusivity.[101]

46. Furthermore, Time Warner's argument that exclusivity is necessary to prevent Liberty from "free riding" off of Time Warner's investment is not persuasive. Time Warner has not demonstrated that it has expended significant resources in promoting Court TV to build up audience demand in Manhattan, on which Liberty could possibly "free ride." In any event, Congress enacted the program access provisions to allow all competitors access to programming on nondiscriminatory terms and conditions to eliminate certain barriers to entry faced by competing MVPDs.

47. Similarly, Time Warner's contention that its continuing investment in Court TV was based on its receipt of exclusive distribution rights is insufficient to persuade us that continued enforcement of such exclusivity is in the public interest. Moreover, Court TV was launched in July 1991. The program access provisions were enacted in October 1992, and operators were allowed time to modify their contracts in accordance with the statute.[102] Time Warner was on notice that its exclusivity was no longer guaranteed, yet it continued to invest in Court TV. Thus, we are not persuaded by Time Warner's claim that without continued exclusivity for Court TV, Time Warner would not have continued to invest.

48. In response to Time Warner's argument that loss of exclusivity will cause Time Warner to forfeit the benefit of its bargain, we recognize that Time Warner may not benefit as it had hoped from its financial commitment to Court TV. However, Congress made a policy choice to disfavor such exclusive contracts. In reaching a determination concerning the public benefits of exclusivity, the Commission must balance on a case-by-case basis the public interest supporting a programming vendor's need for investment incentives against the public's interest in access to programming by competing distributors. The private benefits of exclusivity to Time Warner are not at issue. Moreover, Time Warner has not demonstrated that exclusivity is necessary for continued investment in and development of Court TV.

49. We do not believe that the ability to secure exclusive distribution is necessary to assure future financing and carriage of this service. We agree with Liberty that as Court TV grows, more of its financial needs may be met with outside revenue from licensing fees from competitors. Given Court TV's popularity and broad appeal, exclusivity now is not necessary to the service's financial growth and viability. We believe that Time Warner has not persuasively established its claim that exclusivity is necessary for continued financial support for Court TV.

50. Moreover, we disagree with Time Warner's claim that denying exclusivity in this case will necessarily chill future investments in other new programming services. Whether an exclusive agreement is permitted will be evaluated on a case-by-case basis. In this case, given the current popularity of Court TV, the facts presented by Time Warner did not demonstrate that continued exclusivity is vital for the viability of Court TV. Indeed, cable investors are well aware of the limits on exclusivity imposed by the 1992 Cable Act, and must adapt to the current regulatory environment. Even so, the record reflects that many new channels are planned by programming vendors.[103] Our decision today is consistent with the regulatory and statutory framework within which investors must make their current decisions.

2. Diversity in Programming

51. The statute requires us to consider the effect of exclusivity on diversity in the programming market.[104] Exclusivity may promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service. However, Court TV is an existing and successful programming service. We conclude that Time Warner has failed to demonstrate that continued exclusivity for Court TV is currently needed to promote diversity in programming.

52. We reject Time Warner's argument that exclusivity provisions, such as the one at issue, are in the public interest because they encourage diversity by forcing competitors to finance their own programming. Time Warner acknowledges that the costs associated with developing, launching and promoting a cable network are formidable. As experience shows, in the face of these barriers, the prior use of exclusivity by the vertically integrated entities in the cable industry hardly spurred competing distributors to develop new sources of programming. To the contrary, exclusivity simply led to foreclosure of those services to

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[99] *See Program Access Order*, 8 FCC Rcd at 3385.

[100] *See NECN* at para. 36.

[101] In contrast, we found in *NECN* that such exclusivity "within NECN's limited target markets" might be critical to its financial viability as a regional service. *See NECN* at para. 36.

[102] *See Program Access Order*, 8 FCC Rcd at 3414-15.

[103] Petition, Exhibit D, *Cablevision* (Dec. 20, 1993) at 51.

[104] Communications Act, § 628(c)(4)(D), 47 U.S.C. § 548(c)(4)(D).

competitive distribution technologies and entrenchment of local cable monopolies. As a result, Congress enacted the program access provisions of the 1992 Cable Act. We cannot imagine that Congress intended the Act to be used to force competitors to develop their own programming, which is precisely what the statute was enacted to prevent. Thus, we reject Time Warner's argument that the proposed exclusivity should be approved because it will foster diversity.

53. Therefore, we find that Time Warner has failed to demonstrate that continued enforcement of its exclusive contract with Court TV (1) is necessary for capital investment; or (2) promotes diversity. We conclude that the recognized benefits that exclusivity can provide to the programming market —increased diversity or attraction of capital investments — are not present in this case and, accordingly, do not support a finding that the proposed exclusivity is in the public interest.

C. Duration of Exclusivity

54. The fifth public interest factor the statute requires us to consider is the duration of the contract.[105] Where the duration of the exclusivity is tailored to the minimum period of time reasonably necessary to develop and firmly establish the programming service through assured financing, promotion and marketing, then such limited duration may weigh in favor of allowing exclusivity. We note that the full term of the exclusive contract runs for 15 years, denying access to Court TV until the year 2006. While we need not reach this issue, we do not believe that, in any event, Time Warner could demonstrate that such an excessive period of exclusivity is consistent with the statute. As discussed above, we determine that Court TV has already attained a significant level of popular appeal to consumers, and therefore find that continued enforcement of exclusivity for any length of time in this case is not in the public interest.

D. Conclusion

55. We find that Time Warner has failed to demonstrate that continued enforcement of its exclusive contract with Court TV is in the public interest. Petitioners have the burden of demonstrating that the vertically integrated programming vendor's grant of exclusivity to the cable affiliate results in a public interest benefit by creating incentives for investment in and distribution of diverse programming that outweighs Congress' presumption that such exclusivity hinders the development of competition in the distribution market. The proposed exclusive agreement withholds a popular service from emerging competitors to cable, such as Liberty Cable in Manhattan, thereby directly constraining the development of competition in a particular local distribution market. Moreover, we find that it is likely that the proposed exclusivity will similarly inhibit competition in other local distribution markets and in the national distribution market. The proposed exclusivity will also have a limiting effect on the development of MVPD competitors using alternate technologies other than cable. We further find that no countervailing public benefits, as determined by the public interest factors set forth in the Act, will be derived from allowing continued enforcement of the incumbent cable operator's rights to exclusivity. The facts demonstrate that Court TV is a viable, successful programming service with broad, national appeal. Exclusivity is not necessary for the survival of the service. In addition, exclusivity in this case will not promote diversity in programming. Therefore, we conclude that continued enforcement of Time Warner's exclusive contract with Court TV is not in the public interest.

56. Finally, we note that Time Warner's request differs in a number of critical respects from the request of New England Cable News, whose exclusivity agreement we approve today. With respect to the effects of exclusivity on the development of competition in the distribution market, we found in *NECN* that the record demonstrated only minimal effects on competition in the relevant distribution markets, which were offset by countervailing public interest benefits to the programming market. In contrast, we find that Time Warner's proposed exclusivity would have a direct adverse effect on competition in the relevant distribution markets, particularly in Manhattan.

57. With respect to the public interest benefits of exclusivity, in *NECN* we concluded that "exclusivity may be important, if not critical, to NECN's survival."[106] In reaching that conclusion, we emphasized that NECN is a *regional* service, and that "the nature of NECN's programming inherently places it in a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal."[107] In this case, however, Time Warner has failed to show that proposed exclusivity is necessary for Court TV's viability. Moreover, Court TV is delivered to about 700 affiliates across the country and to more than 13 million subscribers, according to Time Warner.[108] Furthermore, the exclusivity agreement at issue in *NECN* is of seven years' duration, while the Court TV agreement at issue here may run for 15 years.[109] Accordingly, while NECN has carried its burden of persuading us that its exclusivity agreement promotes the public interest, Court TV has not.

V. ORDERING CLAUSE

58. Accordingly, IT IS ORDERED, that the petition for exclusivity filed by Time Warner Cable ("Time Warner") requesting a finding that its exclusive contract with Court TV is in the public interest IS DENIED, and Time Warner's enforcement of the exclusivity provision is impermissible.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[105] Communications Act, § 628(c)(4)(E), 47 U.S.C. § 548(c)(4)(E).
[106] *NECN* at para. 35.
[107] *NECN* at para. 36.
[108] *See* para. 4, *supra*.
[109] *See NECN* at para. 52; *See also* para. 54, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND CABLE NEWS — CSR-4190-P

Petition for Public Interest Determination Under 47 C.F.R. §76.1002(c)(4) Relating to Exclusive Distribution of New England Cable News

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1994; Released: June 1, 1994

By the Commission: Commissioners Ness and Chong not participating.

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I. INTRODUCTION

1. The Commission has before it a petition filed by New England Cable News ("NECN"), a new regional cable news network, requesting a public interest determination pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules that will authorize NECN to enter into exclusive program distribution agreements with cable television system affiliates (the "Petition").[1] NECN contends that the relief requested is authorized by and consistent with the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and is in the public interest because it will promote the development of diverse new program service offerings such as regional cable news services.

2. The petition was placed on public notice on January 26, 1994, and was not opposed.[3] Pursuant to our program access regulations, in order to facilitate a complete analysis of the issues raised in the petition, the staff submitted a written request to NECN for additional information. Based on our review of the petition and of NECN's written responses to the staff's further inquiry, we have determined that granting the petition, thus allowing NECN to enter into exclusive distribution arrangements with cable operators, limited as described below, meets the public interest criteria set forth in the 1992 Cable Act and our implementing regulations.

II. BACKGROUND

3. Section 628(c)(2)(D) of the 1992 Cable Act provides that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.[4] In determining whether the proposed exclusivity is in the public interest, the statute directs the Commission to consider five specific factors:

> (a) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
>
> (b) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
>
> (c) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
>
> (d) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
>
> (e) the duration of the exclusive contract.[5]

The Commission has determined that vertically integrated programming vendors seeking to enter into exclusive distribution agreements with cable operators in served areas must first petition the Commission for a finding that the proposed exclusivity meets this public interest standard.[6] NECN's petition seeks such a determination.

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[1] Copies of the Petition and correspondence relating thereto are available to the public in the Commission's Public Reference Center, 1919 M Street, N.W., Room 242.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *See* 47 C.F.R. § 76.1002(c)(5)(ii).

[4] *See* 47 U.S.C. § 543(c)(2)(D). Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against "practices, understandings, arrangements and activities, including exclusive contracts... between a cable operator and a [vertically integrated programming vendor]" in areas not served by a cable operator as of October 5, 1992. *See* 47 U.S.C. § 548(c)(2)(C). We note that this *per se* prohibition against exclusivity is not at issue in this case because the petition seeks authority for exclusive distribution in served areas only.

[5] *See* 47 U.S.C. § 548(c)(4).

[6] *See First Report and Order*, MM Docket No. 92-265 (*"Program Access Order"*) , 8 FCC Rcd 3359, 384 (1993), *recon. pending*.

4. According to petitioners, NECN began operations on March 2, 1992. NECN provides 24-hour programming by satellite to cable television systems serving approximately 950,000 cable subscribers in Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. NECN's programming consists of news, public affairs, weather, sports news, informational, and children's programming.[7] NECN seeks authority to enter into exclusive programming agreements with cable system affiliates in the six New England states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island ("the New England states"), by which the affiliate would receive an exclusive license to distribute NECN within the affiliate's cable franchise area for seven years.

5. NECN is a general partnership owned by The Hearst Corporation ("Hearst")(50 percent ownership) and Continental Cablevision, Inc. ("Continental")(50 percent ownership). Hearst is a diversified media company that owns radio and television stations, television production facilities, newspapers, and magazines, and has ownership interests in several satellite cable program services.[8] Hearst does not own any cable systems. Continental has minority interests in several satellite cable program services and owns numerous cable systems.[9]

6. Continental's 50 percent ownership of NECN is "attributable" pursuant to Section 76.1000(b) of the Commission's rules, making NECN a vertically integrated cable satellite programming vendor subject to our program access rules.[10] Accordingly, NECN may not provide a cable system affiliate the exclusive right to distribute NECN within the operator's local franchise area absent an affirmative determination by the Commission that such exclusive distribution meets the public interest criteria set forth in Section 628(c)(4) of the 1992 Cable Act.[11] Thus, NECN has petitioned the Commission for a finding that its proposed exlcusivity meets the statutory public interest standard.

7. NECN's proposed exclusivity provision would provide cable system affiliates in the New England states the exclusive right to distribute NECN by means of cable, wire and fiber within the area served by the cable affiliate, for a period of seven years. It further provides that during this seven-year period, NECN will not authorize distribution of NECN by "SMATV, MMDS, DBS or any other multichannel video program provider within the area served by the cable system."[12]

III. Summary of Petitioner's Arguments

8. Citing the Commission's express recognition that exclusivity can meet the statutory public interest test if shown to be essential to the economic viability of local or regional programming services, NECN contends that it offers precisely the type of program service for which exclusivity is appropriate.[13] NECN's program affiliation contract describes the service as a "regional (greater Boston area and New England) news, weather, sports and such other supplemental programming of regional interest in the New England area as NECN may, from time to time, elect to provide."[14]

9. Moreover, NECN points out that in the 1992 Cable Act's program access provisions, Congress expressly did not prohibit all cable program exclusivity agreements governing areas served by cable operators. NECN recites the underlying policy objectives of these provisions as (a) promotion of the development and distribution of new and diverse satellite cable program services, and (b) fostering the development of, and competition among, facilities based multichannel program distributors. NECN contends that both objectives would be advanced by Commission approval of the exclusivity requested by NECN.[15]

10. NECN argues that approving its request would enhance the development and distribution of new and diverse satellite cable programming. In support, NECN recites the current financial difficulties faced by NECN, and states that its operating losses cannot be sustained indefinitely. NECN contends that a principal cause of its financial difficulties has been the reluctance of cable operators in recent months to enter into affiliation agreements.[16] NECN attributes this "reluctance" to an overall sense of financial uncertainty by cable operators in the new rate-regulated environment, and a perception that a regional news channel cannot be expected to yield the kind of profits for an operator that may be delivered by a national entertainment or sports programming channel.[17] NECN also contends that its difficulty in securing carriage on cable systems is not

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[7] Petition at 2.

[8] Hearst has ownership interests in ESPN, ESPN2, Arts and Entertainment (A&E), and Lifetime. Petition at n.4.

[9] Continental is the third largest cable MSO in the United States and has interests in Turner Broadcasting System, Inc. (TBS), Digital Cable Radio, E! Entertainment Television, Home Shopping Network, Inc., QVC Network, Inc., Viewers Choice Pay Per View Network, and regional sports networks in Florida and Minnesota. Petition at n.5.

[10] *See* 47 C.F.R. §§ 76.1000-1003.

[11] *See* paragraph 3, *supra*.

[12] Petition at 9. The specific proposed language is:

> 2. *Grant of Rights*
>
> 2.1 NECN hereby grants to Affiliate the exclusive license to distribute the service by means of cable, wire or fiber communication to subscribers within the territory served by Affiliate.
>
> 2.2 This license conveys to Affiliate only those rights expressly hhgranted herein. All other rights with respect to the service are reserved to NECN. Nothing in this agreement shall restrict or be interpreted so as to restrict in any manner the prerogative of NECN to distribute the Service in any area through any medium of communication by itself or through third parties; *provided however,* that NECN agrees that it shall not enter into any agreement authorizing the distribution of the service to any multichannel videoprovider (i.e. DBS, SMATV, MMDS, telco, etc.) competing with Affiliate within Affiliate's service area for a period of seven years from the date of this agreement or the expiration or termination of this Agreement, whichever is shorter. Notwithstanding anything to the contrary herein, NECN may, at its election as a matter of professional and social responsibility, share or exchange news or other video footage with other providers of national, regional or local news.

[13] Petition at 6, citing *Program Access Order,* 8 FCC Rcd at 3385.

[14] *Id. See also* petition at 7-9 for extensive description of various aspects of NECN's news and information programming.

[15] Petition at 10.

[16] Petition at 11.

[17] Petition at 12-14.

due to limited channel capacity.[18] NECN notes that, "[n]otwithstanding the award-winning quality of [NECN's] program service, it is, nevertheless, a specialized, regional program service whose appeal to mass audiences and local advertisers has not yet had time to develop fully."[19]

11. NECN contends that, given the growing demands and competition for cable channels, a program service that cannot be offered to a cable system on an exclusive basis is significantly less attractive to a cable operator than an exclusive service. Cable operators seek to distinguish their programming from that of their competitors. Thus, NECN states that cable operators are reluctant, or will refuse, to commit money to finance and promote a new service that might subsequently be carried by a competitor if it becomes successful.[20]

12. Moreover, of the nation's five other existing regional news networks, all provide exclusive distribution to their cable affiliates.[21] NECN contends that exclusivity is no less important to cable systems in New England than it is to cable systems in other regions of the country, and the fact that all five of these regional news networks provide exclusivity serves to underscore the importance of exclusivity to secure carriage of the programming by cable systems.[22]

13. In addition, NECN submits that it competes head to head with 33 New England commercial television stations which provide news and informational programming, as well as with other cable networks which provide news programming. NECN indicates that it is "customary for broadcast networks to offer network program exclusivity provisions to their affiliates for the entire term of their affiliation agreements, and that the Commission's broadcast network non-duplication rules (47 C.F.R. §§76.92-76.97) require cable systems to provide broadcast networks program exclusivity for the life of their network affiliation agreements."[23] Moreover, NECN contends that its broadcast network competitors enjoy a further competitive advantage in that the must carry provisions of the 1992 Cable Act (47 U.S.C. §534) mandate carriage by cable systems within each television station's ADI.[24] Thus, NECN concludes that it would be placed at a serious competitive disadvantage if the Commission does not permit it to utilize the same flexibility and negotiating tools available to its broadcast and non-vertically integrated cable network competitors.[25]

14. NECN further concludes that, should NECN fail financially because it is not permitted to offer a reasonable measure of program exclusivity, its failure will have a negative impact on the development of other new program services, particularly high quality, public interest services. NECN notes that the cost of launching a new service is enormous, as are the financial risks, and "an indifference by the Commission to competitive market conditions will only discourage investment in and the development of these services."[26] NECN believes that a favorable ruling will send a positive message to the programming industry, and will stimulate investment in and development of other new satellite cable programming services.[27]

15. NECN points out that it is experimenting with new and creative media partnerships, such as its innovative news sharing relationship with *The Boston Globe*, in an effort to increase television viewer choices and provide quality programming. NECN argues that a regulatory policy that would "encourage and promote, rather than discourage and impede, these kinds of new and innovative media partnerships and program services is in the public interest."[28] Thus, NECN seeks the "opportunity to be as competitive as it can in securing cable carriage that will enable it to fulfill its original mission of providing cable television subscribers of the six New England states additional program diversity and access to a wide choice, twenty-four hours a day, of high quality news, weather, sports, public affairs, information and children's programming."[29]

16. NECN contends that the content of its programming service is "clearly in the public interest."[30] NECN states that local, regional and national news provide citizens with information necessary to participate effectively in a self-governing democracy, and notes that the Commission has traditionally viewed news and public affairs programming as having significant public interest value. In addition, NECN states that with the passage of the Children's Television Act of 1990,[31] Congress has made it clear that programming that serves the special needs of children is highly valued from the standpoint of the public interest.[32]

17. NECN further argues that granting its petition would have a pro-competitive effect on the New England video marketplace because the removal of regulatory encumbrances that threaten the financial viability of NECN would enhance rather than impair competition in the market for news, sports, public affairs, information and children's programming in New England.[33] NECN argues that granting its petition would not impede the development of competitive services by other programmers, and would in fact provide an incentive for new multichannel video programming distributors to develop competing regional programming services.[34] Further, NECN contends that grant of its petition would not adversely affect competition in the national programming marketplace because NECN is a regional service with more limited appeal.[35]

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[18] Letter by NECN, dated April 4, 1994 ("Letter"), submitted in response to the Commission's written request for further information dated March 10, 1994, at 5.

[19] Petition at 12.

[20] Petition at 15-18.

[21] Petition at 19. Of the five services, three are not vertically integrated (Orange County Newschannel, Chicagoland TV, News 8), and thus are not subject to the program access rules. The two vertically integrated services (New York One News and News 12) are distributed to cable systems owned by the parent companies of the networks, and, according to NECN, are not governed by the program access rules because they are not "satellite" cable programming.

[22] *Id.*

[23] Letter at pages 2-3.

[24] *Id.*

[25] Letter at page 3.

[26] Petition at 21.

[27] *Id.*

[28] Letter at page 5.

[29] Letter at pages 5-6.

[30] Letter at page 4.

[31] 47 U.S.C. §§303a, 303b, 394.

[32] Letter at page 4.

[33] Letter at page 3.

[34] *Id.*

[35] Petition at 22.

18. NECN also argues that the exclusivity it requests would have no adverse effect on the development of competition by competing multichannel distributors. NECN states that there are currently no MMDS operations in New England.[36] While there are several small SMATV systems operating in New England, serving approximately 5,000-10,000 subscribers, only one SMATV provider has even called to inquire about the existence of NECN's service, but did not seek to carry NECN.[37] Moreover, because NECN does not scramble its satellite feed, NECN is available to TVRO users.[38] Thus, NECN contends that granting its petition would not result in denial of access to its programming by alternative multichannel video distributors, except for a very small number of SMATV operators.[39] NECN points to its current difficulty in securing carriage by cable operators to support its conclusion that denying its service to others would have no adverse effect on the development of competitive local multichannel distributors.[40]

19. NECN states that its request for exclusivity for seven years is linked to the term of affiliation agreements it hopes to negotiate with cable operators. NECN estimates that it will incur millions of dollars of operating losses each year for the next 7-10 years. Thus, NECN submits that securing long term network affiliation agreements during this critical time period is essential to its financial viability. Moreover, NECN contends that because "vigorous competition to cable from telephone companies, DBS, MMDS and other multichannel distributors is several years away, the prospect of assuring network exclusivity for seven years takes on an importance for cable operators now that it might not otherwise have."[41] Finally, the extent of exclusivity is limited to the franchise areas of cable systems located within the six New England states.[42]

IV. ANALYSIS

20. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming market.[43] When adopting the statute, Congress was very concerned with the fact that the majority of cable operators enjoyed a monopoly in video programming distribution at the local level,[44] and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.[45] In addition, Congress found that increased horizontal concentration of cable operators together with extensive vertical integration has created an imbalance of power between operators and unaffiliated programming vendors, and operators and their multichannel competitors, which also impedes the overall development of competition.[46]

21. Thus, in the 1992 Cable Act, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable, and prohibited such exclusive contracts within areas served by cable absent a specific public interest showing, for a period of ten years.[47] Such Congressional restrictions on exclusive contracts for this ten-year period are intended to foster the development of emerging competitors to cable, allowing a transition to full competition in the market for programming distribution.

22. Congress recognized, however, that in areas served by cable some exclusive contracts between vertically integrated programming vendors and cable operators may provide countervailing benefits to the programming market or to the development of competition among distributors.[48] Congress provided that where such an exclusive contract is demonstrated to be in the public interest, it should be allowed. The public interest criteria set forth in the 1992 Cable Act reflect the benefits to the programming market that exclusivity in areas served by cable may provide in a particular case, which can ultimately rebut the presumption inherent in the statute's program access provisions that exclusive contracts between vertically integrated programming vendors and cable operators are anticompetitive.

23. Any agreement between a vertically integrated programming vendor and a cable operator that grants a cable operator the exclusive right to distribute programming within its franchise area must be approved by the Commission before it may be enforced.[49] A party seeking to enter into or enforce such an agreement must file a petition with the Commission seeking a determination that the proposed exclusivity meets the public interest standard articulated in the statute. Given Congress' express desire to foster the development of competition in the market for distribution of video programming, any party filing an exclusivity petition with the Commission bears the burden of demonstrating that the proposed exclusivity meets the statutory public interest standard.

24. The Commission has determined that the statute requires an examination of petitions for exclusivity on a case-by-case basis.[50] When engaging in this type of examination, we will examine the effect of a particular exclusive contract on each of the factors listed in Section 76.1002(c)(4) of our rules. We believe, however, that the public interest criteria must be considered as a whole in making the statutory determination. Thus, we must examine whether the proponent of exclusivity has met its burden of demonstrating that the statutory presumption that the public interest is served by requiring open access by emerging competing distributors to the programming at issue is offset by countervailing public benefits derived

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[36] Petition at 22.
[37] Letter at page 3.
[38] *Id.*
[39] Letter at 4.
[40] Petition at 22.
[41] Letter at page 2.
[42] Letter at page 3.
[43] *See* 47 U.S.C. § 548(a).
[44] 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Con.2 d Sess. (1992) ("House Report") at 42.
[45] 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 25-26.
[46] *See Program Access Order*, 8 FCC Rcd at 3366.
[47] *See* 47 U.S.C. §§ 548(c)(2), (4), and (5).
[48] *See* 47 U.S.C. §§ 548(c)(2), (4).
[49] *See Program Access Order*, 8 FCC Rcd at 3386.
[50] *See Program Access Order*, 8 FCC Rcd at 3385.

from allowing exclusive agreements to create incentives for investment in the development and distribution of services that will promote diversity in the programming market.

25. Our application of the public interest standard, therefore, will begin with an evaluation of the effect of the proposed exclusivity on the development of competition in the distribution market. The statute requires the Commission to consider the effect of the proposed exclusivity on the development of competition in local and national multichannel video programming distribution markets, and on competition from multichannel video programming distribution technologies other than cable. In conjunction with this examination, we believe it is appropriate to evaluate the geographic extent of the proposed exclusivity to identify the relevant markets within which the proposal may affect the development of competing distributors.

26. Next, we will examine whether the petitioner has demonstrated that the proposed exclusivity benefits the public by creating incentives to invest in and support the creation and distribution of new and diverse programming. Exclusivity may be in the public interest where it is essential to the financial viability of the programming service. We will also examine whether the petitioner has demonstrated that the proposed exclusivity promotes diversity in programming. Exclusivity may enhance program diversity, for example, by encouraging promotion and carriage of programming which has a unique audience or subscriber appeal, or a limited distribution potential.

27. Finally, we will examine the duration of the proposed exclusivity. We will evaluate whether the proposed exclusivity has been sufficiently tailored to provide exclusivity for the minimum time period reasonably required to achieve the public interest benefits identified by the petitioner without imposing the kind of effect on the development of competition in the distribution market that Congress sought to ameliorate through the program access provisions.

A. Effects of Exclusivity on the Development of Competition in the Distribution Market

28. We have noted that Congress intended, by enacting the program access provisions of the 1992 Cable Act, to foster the development of "facilities-based" competition, which is defined as competition among distributors.[51] Cable systems have generally developed without effective competition. As noted in the *Program Access Order*, in order for "facilities-based" competition to develop, "access to programming is an essential prerequisite."[52] The statutory public interest factors address two aspects of the development of competition to cable. One factor that the Commission must consider is the effect of the proposed exclusivity on the development of competition in local and national programming distribution markets. Another factor the Commission must consider is the effect of the proposed exclusivity on competition from MVPD technologies other than cable.[53]

29. We believe that the geographical extent of the exclusivity proposed should be tailored to that reasonably necessary to develop and establish the viability of the programming service, while minimizing the effect on the development of competition in the relevant distribution markets. With respect to the effect of the proposed exclusivity on competition by MVPDs in local distribution markets, while we anticipate in the long term competition to cable from MMDS operations, it does not appear that such competition presently exists or will exist in the near future. Indeed, at present the record demonstrates that there are no MMDS operations in New England that would be foreclosed from distributing NECN by the proposed exclusivity. In addition, because NECN does not scramble its satellite feed, it is available to local TVRO distributors and users. Moreover, while there are several small SMATV systems operating in New England that serve approximately 5,000-10,000 subscribers, only one SMATV has ever even inquired about the existence of NECN's service, and did not seek to carry NECN.

30. Thus, it appears that granting NECN's request will not result in denial of access to its programming by competing MVPDs in the relevant local markets, except for a small number of SMATV operators. We find it highly relevant to our analysis, moreover, that no SMATV operator has either formally or even informally requested carriage of NECN.[54] We conclude that the record does not indicate that the proposed exclusivity would have an effect on competition in local distribution markets that could not be offset by a demonstration of public interest benefits in the programming market.

31. With respect to the national distribution market, the extent of the proposed exclusivity in this case is limited to the franchise areas of the cable systems located within the six New England states. We note that no existing or potentially competing national MVPD has challenged NECN's request to provide its cable affiliates in these states the exclusive right to distribute NECN. Moreover, NECN is available to TVRO users nationally because its signal is not scrambled. Because of the regional limitations of NECN's programming, we believe that it is unlikely that DBS operators would be interested in carrying NECN immediately or in the near future.[55] Thus, the record does not indicate that the proposed exclusivity would have an effect on competition in the national distribution market that could not be offset by a demonstration of public interest benefits in the programming market.

32. As for the effect of the proposed exclusivity on competition by MVPDs using technologies other than cable, for the reasons discussed above it does not appear that NECN's request would unreasonably limit the distribution of its service by MMDS, TVRO or DBS distributors. The proposed exclusivity would deny NECN to only a very few SMATV operators who, again, have not opposed NECN's petition. Moreover, NECN has limited its request to exclusive distribution by cable operators within their franchises

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[51] *See Program Access Order*, 8 FCC Rcd at 3384, n.79 (quoting House Comm. on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) ("Conference Report") at 93, reprinted at 138 Cong. Rec. H8308 (daily ed. Sept. 14, 1992)).

[52] *Id.* at 3384.

[53] *See* 47 U.S.C. §§ 548(c)(4)(A)-(B).

[54] Although not determinative of the result reached here, we do note that no SMATV operator, nor any other competing MVPD or potential competitor, has opposed NECN's request for a finding that its ability to grant exclusive distribution rights to cable affiliates for seven years is in the public interest.

[55] Moreover, we emphasize that our ruling would not deny access to such programming in areas unserved by cable.

only in the six New England states. Thus, the request will not deny access to NECN by potential distributors using developing technologies outside New England or outside the franchise areas of NECN's cable affiliates within the New England states. Therefore, we conclude that the exclusivity proposed by NECN will not have an effect on competition from MVPDs using technologies other than cable that could not be offset by a demonstration of public interest benefits to the programming market.

B. Public Interest Benefits of Exclusivity

1. Attraction of Capital Investments in Production and Distribution of Programming

33. The 1992 Cable Act requires the Commission to consider whether exclusivity serves as an investment incentive for cable operators to finance, promote and carry a new service.[56] By including this criterion in the statutory public interest test, Congress recognized that exclusivity arrangements are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product. In this manner, exclusive distribution may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market. We believe that this recognized benefit from exclusivity is particularly relevant to our consideration of the public interest benefits from allowing a start-up regional venture, such as NECN, to grant exclusive distribution rights to its cable affiliates.

34. Where a programmer requires the ability to offer an added incentive to attract investment, carriage and support of the service, such that without the incentive the programming service could not be launched or become viable, exclusivity may be in the public interest. We believe that NECN has demonstrated that exclusive affiliations with cable operators for distribution of NECN within the affiliates' service areas are required to attract and secure capital investments for production, promotion, distribution and carriage of its regional news service.

35. We recognize and appreciate the current financial hardships experienced by NECN, and the difficulty it describes in persuading many cable operators to add NECN as a new service on their systems under the current regulatory environment. These difficulties affect all programming services. It is not uncommon for new programming services to sustain losses for long periods of time before their investors can begin to see any return on their investment. Similarly, NECN's contention that a service that cannot offer exclusivity to a cable operator is "significantly less attractive," also does not identify a unique obstacle facing NECN. While neither of these arguments can be determinative in our analysis, they are additional factors in support of an affirmative public interest determination, concluding that exclusivity may be important, if not critical, to NECN's survival.

36. Moreover, what makes NECN different from other programming services, and even differentiates it from other *new* programming services, is the regional nature of its programming and audience appeal. Because this service by definition appeals to a much smaller potential subscriber base, it has a naturally limited distribution potential. The limited extent of the target market from which NECN can secure carriage reduces potential revenues from distribution as well as advertising. In addition, this limited revenue potential diminishes NECN's ability to generate an ultimate return on investment, making it less attractive to investors. Thus, the nature of NECN's programming inherently places it in a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal. Accordingly, we believe that the ability to offer cable operators exclusivity within NECN's limited target markets may be critical to the financial viability of a regional service like NECN, because it provides an incentive for cable operators, shown by the record to be the only significant existing means for multichannel video programming distribution in New England, to choose to carry NECN over other programming services.

37. Moreover, the Commission has already recognized that, in such situations, exclusivity may well pass the statutory public interest standard. In the *Program Access Order*, the Commission stated: [W]e recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market.[57] Indeed, we expressly recognized that "it is possible that local or *regional* news channels could be economically unfeasible absent an exclusivity agreement."[58] Thus, we agree that NECN is the type of programming service we envisioned would be appropriate for adequately tailored exclusivity and thus, due to the regional nature and limited distribution potential of its programming, might need the ability to offer exclusivity in order to attract investment, promotion and carriage of NECN.

38. Further, we agree with NECN that, when evaluating requests for exclusivity, the Commission should not be "indifferent" to the competitive market conditions faced by the petitioner. We find it highly significant that all of the other regional news networks in the country provide exclusive distribution to their cable affiliates, which supports NECN's assertions regarding the importance of the ability to offer exclusivity to the viability of a regional service like NECN.[59] Thus, we find merit to NECN's argument that it would be placed at a competitive disadvantage if it were unable to offer exclusive distribution to its cable affiliates.

39. We conclude that NECN has demonstrated that the ability to offer exclusive distribution to its cable affiliates may be necessary to attract capital investment in the production and distribution of its regional programming. Moreover, we agree with NECN that a favorable ruling on its request may stimulate investment in and development of other new satellite cable programming services, and that these facts must weigh in favor of permitting NECN to offer reasonably tailored exclusivity to its cable system affiliates.

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[56] *See* 47 U.S.C. § 548(c)(2)(C).

[57] 8 FCC Rcd at 3385.

[58] *Id.* (emphasis added).

[59] In addition, we recognize that NECN's New England broadcast competitors may benefit from the must carry rules which ensure their distribution.

2. Diversity in Programming

40. The statutory factors set forth in the 1992 Cable Act for the public interest analysis required to approve exclusive distribution by cable operators include consideration of the effect of exclusivity on diversity in the programming market.[60] We agree that exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service. Moreover, we agree with NECN that our regulatory policy should encourage and promote, to the extent consistent with the statute, new and innovative media partnerships and program services like those provided by NECN.

41. We have concluded the ability to offer reasonably tailored exclusive distribution rights to cable affiliates may be essential for NECN's financial survival. If NECN does not achieve financial viability through a significant increase in its distribution in the near term, the programming market will lose an award-winning, quality regional news service. Thus, it appears that promoting the financial survival of NECN by allowing it to offer appropriately limited exclusivity as an incentive for cable affiliates to distribute NECN's programming will foster the public interest in enhancing diversity of programming services.

42. NECN further contends that the content of its programming service is relevant to the public interest analysis. As a general matter, we do not believe that it is appropriate to evaluate the content of a programming service that is seeking approval of exclusive distribution by cable operators. We nonetheless observe that the Commission and Congress have indeed recognized the public interest value provided by news, public affairs, informational and children's programming. Here the increased diversity provided by additional news, public affairs, informational and children's programming weighs favorably in the public interest analysis required under the statute. Given our finding that exclusivity plays a vital role in the growth and financial viability of NECN, we believe that appropriately tailored exclusivity will foster the public interest in promoting diversity in programming in this situation.

43. Moreover, we agree with NECN that granting its petition will have a pro-competitive effect on the New England video marketplace because removal of regulatory barriers to its financial viability will enhance, rather than impair, competition in the market for news, sports, public affairs, information and children's programming. In addition, NECN's ability to offer exclusive distribution to its cable affiliates should not impede the development of competitive services by other programmers, nor dissuade new MVPDs from developing their own competing regional programming services. Thus, we believe that NECN has demonstrated that its proposed exclusivity will enhance diversity in the programming market, which weighs in favor of granting NECN's petition.

C. Duration of Exclusivity

44. The final statutory factor that must be evaluated is the duration of the proposed exclusivity.[61] Where the duration of the exclusivity is tailored to the minimum period of time reasonably necessary to develop and firmly establish the programming service through assured financing, promotion, marketing and carriage without unduly denying the availability of the service to competing distributors, such limited duration may weigh in favor of allowing exclusive distribution by cable operators.

45. NECN states that it has requested the ability to provide exclusivity to its affiliates for seven years because that is the duration of the affiliation agreement it seeks to obtain from distributors. NECN maintains that such long term affiliation agreements are crucial because it expects to incur millions of dollars of operating losses each year for the next 7-10 years. NECN contends that vigorous competition to cable from telephone companies, DBS, MMDS, and other multichannel distributors is "several years away," making seven years of exclusivity "even more important to a potential cable distributor" because the benefits of exclusivity will not accrue to the cable affiliate until competition from other distributors actually develops.[62]

46. We note that the Commission previously sought comment on, and considered, the question of the appropriate duration of permitted exclusivity for new programming services when conducting its rule making proceeding to implement the program access provisions of the 1992 Cable Act. The record in the program access proceeding reflected a widespread disagreement on the appropriate duration of permitted exclusivity, with proposals ranging from two years to ten years or longer.[63] None of the commenters expressing a view, however, supported its proposal with any empirical evidence or other support to justify its conclusions, leaving the Commission to conclude that such matters would have to be resolved on a case-by-case basis.

47. In determining the appropriate duration for allowing a programming vendor to provide exclusive distribution agreements to its cable affiliates, the Commission must again balance the benefits of allowing exclusivity as an incentive for the investment in and distribution of new programming services that will enhance diversity against the overarching goal of the program access requirements, which is to foster the development of competition in the local and national distribution marketplace. Therefore, the duration of exclusivity must be tailored to achieve the public interest benefits in allowing the vertically integrated programming vendor to develop a viable service, while at the same time limiting the effects of such exclusivity, to the extent possible, on the growth of competitive MVPDs.

48. NECN began operations two years ago, but now reaches only one million cable subscribers. NECN projects significant losses for the next 7-10 years. For NECN to survive, it needs the opportunity to establish itself and gain popularity among consumers. NECN has shown that it must quickly and significantly increase its distribution in order to generate revenues from distribution and advertising sufficient to begin to offset NECN's significant financial losses. Obviously, it is in NECN's long term interest to be carried by as many multichannel video programming distributors as possible. At present, however, exclusivity may provide the necessary incentive to induce cable systems to carry NECN's service. As consumer demand for the service

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60 *See* 47 U.S.C. § 548(c)(4)(D).
61 *See* 47 U.S.C. § 548(c)(4)(E).
62 Letter at page 2.
63 *See Program Access Order*, 8 FCC Rcd at 3385, n.84.

develops, cable operator reliance on exclusivity as an incentive to continue to carry NECN should change. Moreover, NECN's losses in the future can eventually be lessened by the revenue and increased advertising that can be generated from increased distribution through sales to competing distributors. Thus, it seems likely that NECN itself would seek to limit any promise of exclusive distribution by cable operators to that necessary to convince them to carry NECN now.

49. In our *Program Access Order,* we did not establish specific guidelines for assessing what would constitute an appropriate duration for exclusivity. In reviewing NECN's request, and considering all of the factors discussed herein, we conclude that NECN's requested duration is reasonable. As explained below, we are satisfied that NECN has met the requisite burden of demonstrating that the public interest benefits to the programming marketplace counterbalance the general rule disfavoring exclusivity for cable affiliates during the statutory transition period for the development of competition in the distribution marketplace. In order for NECN to provide these public interest benefits, however, it must gain sufficient distribution quickly to survive financially. In the absence of any opposition or evidence to the contrary, we determine that it is appropriate to allow NECN to provide exclusivity to its cable affiliates for the full seven year period proposed. We believe that we should, however, limit NECN's ability to offer exclusive distribution rights to its cable affiliates to a finite period of time, and establish a date certain by which all MVPDs must have access to NECN, in order to minimize the potential effects of such exclusivity on competing distributors that currently exist or may develop in the future.

50. The record shows that NECN must dramatically increase its distribution in the short term in order to sustain financial viability. We believe that the next eighteen months should provide a reasonable time period during which NECN may be permitted to offer exclusivity to cable affiliates in order to rapidly increase its distribution and subscriber base. We further believe that all exclusive distribution rights provided by NECN to its cable affiliates should terminate completely seven years from the effective date of this *Order.* We conclude that limiting the duration of exclusivity in this manner, by minimizing the amount of time during which NECN may grant exclusive distribution to cable affiliates to that reasonably necessary to achieve financial viability, and by establishing a date certain by which all competing distributors must have access to NECN, reasonably balances the public interest in promoting the development of competition in the distribution market against the public interest in promoting the financial viability of NECN.

51. Thus, we determine that it is in the public interest to allow NECN to enter into exclusive distribution agreements with cable affiliates in the six New England states during the next eighteen months, so long as all such exclusive distribution rights terminate seven years from the effective date of this *Order.* At the end of this eighteen month time period, NECN may no longer grant any exclusive distribution rights to cable affiliates without first petitioning the Commission for a finding that the continued ability to offer exclusivity for NECN to cable affiliates is in the public interest.

D. Conclusion

52. We believe that NECN has established that it is in the public interest to allow it to enter into appropriately tailored exclusive distribution agreements with cable affiliates. NECN has demonstrated that the ability to offer exclusivity to cable affiliates is necessary to attract investment and secure distribution essential to the financial viability of its regional news programming service. In addition, NECN has demonstrated that its ability to offer exclusive distribution rights to cable affiliates will foster diversity in the programming market. Moreover, NECN has shown that the public interest benefits that reasonably tailored exclusivity can provide offset the effect that such exclusivity may have on the development of facilities-based competition in the New England distribution market(s). Thus, we conclude that it is in the public interest to allow NECN to offer exclusive distribution to its cable affiliates in the six New England states, within their franchise areas, for the next eighteen months. All exclusive distribution rights provided by NECN to cable affiliates must terminate, however, seven years from the effective date of this *Order.*[64]

V. ORDERING CLAUSE

53. Accordingly, IT IS ORDERED, that the petition for exclusivity' filed by New England Cable News ("NECN") requesting a finding that its proposed exclusive distribution agreements with cable affiliates is in the public interest IS GRANTED as set forth herein, and NECN is hereby authorized to provide exclusive distribution rights to cable affiliates within their franchise areas in the six New England states for the next eighteen months, so long as all such exclusive distribution rights terminate seven years from the release of this *Order.*[65]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton,
Acting Secretary

[64] *See* 47 C.F.R. §1.103.
[65] *Id.*

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